TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 54

I. J. VAN HUFFEL, PETITIONER,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TRUMBULL COUNTY, OHIO

PETITION FOR CERTIORARI FILED APRIL 24, 1931

CERTIORARI GRANTED MAY 25, 1931

(35,828)

(35,828)

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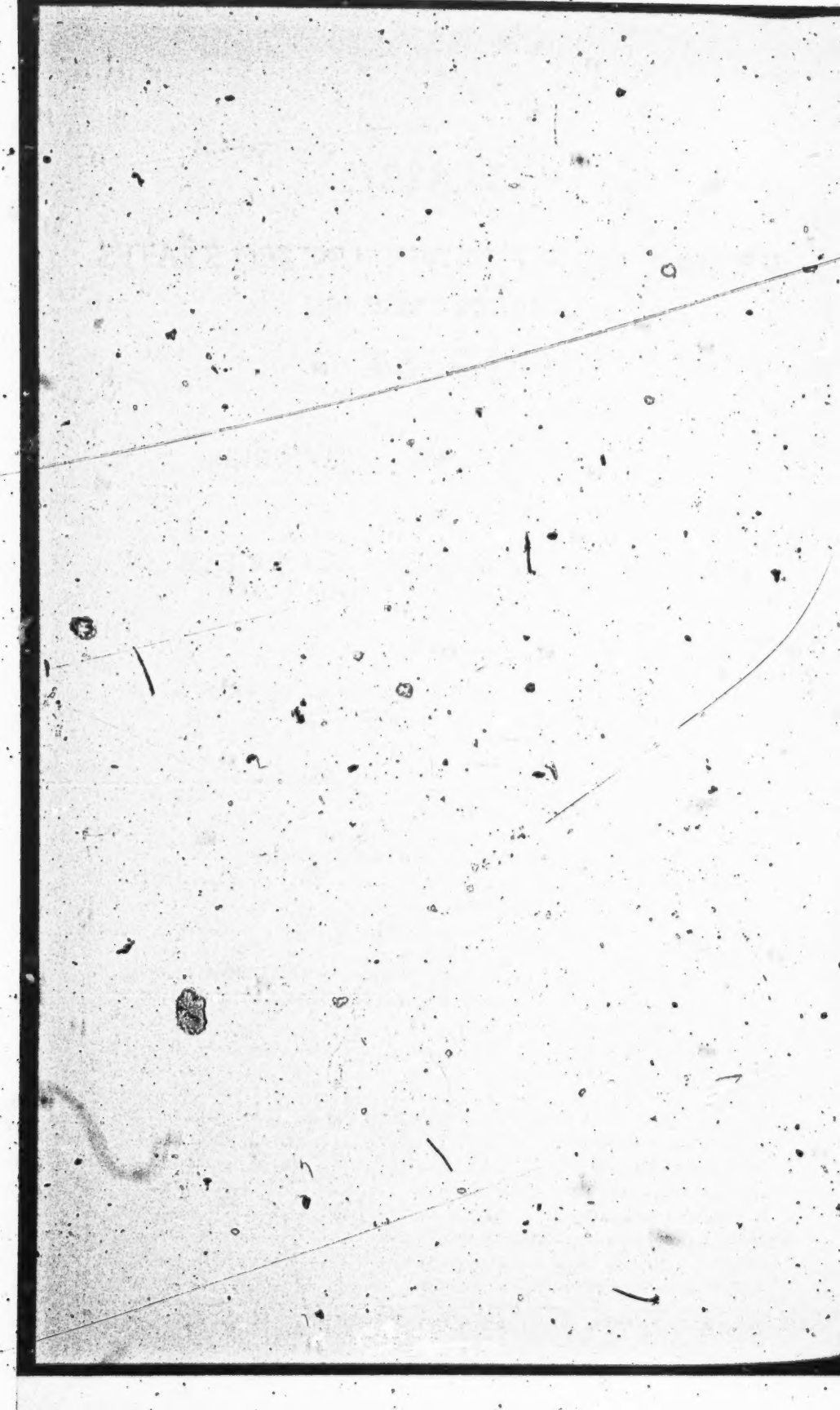


No. 28,887.

In the Court of Common Pleas

OF TRUMBULL COUNTY, OHIO.

I. J. VAN HUFFEL,
Warren, Ohio,
Plaintiff,

vs.

FRANK F. MUSSER, Treasurer,
Trumbull County, Warren, Ohio,
Defendant.

PETITION TO QUIET TITLE AND FOR EQUITABLE RELIEF.

(Filed in Common Pleas Court, March 23, 1929.)

Comes now I. J. Van Huffel, plaintiff, and says that Frank F. Musser is the duly elected, qualified and acting treasurer of Trumbull County, Ohio, and as such is by law charged with the duty of collecting taxes lawfully assessed and appearing upon the tax duplicates of said Trumbull County.

Plaintiff further says that he is the owner of and in possession of the following described real estate, to-wit:

PARCEL No. 1:

Situated in the Township of Howland in the County of Trumbull and State of Ohio, and known as being part of Section 11 of said Township and bounded and described as follows:

Beginning at a stake in the center of Dietz Road, said stake being 283.36 feet from a stone on the center line of said road and Perkins road; thence N. 87° 46′ W. along center line of said road 691.64 feet to a stake; thence S. 2° 14′ W. 30 feet to an iron pin, said iron pin being in the south line of said road; thence continuing S. 2° 14′ W. 311.58 feet to an iron pin; thence continuing along same line 341.58 feet to an iron pin; thence S. 87° 46′ E. 514.79 feet to an iron

pin, said iron pin being on the westerly right of way line of the Erie R. R. Main Line Division; thence N. 43° 02′ E. along said right of way line 352.59 feet to an iron pin; thence S. 87° 23′ W. 53.3 feet to an iron pin; said line being the southerly boundary of the United Concrete Brick Co.; thence N. 2° 12′ E. 385.8 feet along the westerly boundary of the United Concrete Brick Co., to an iron pin, said iron pin being on the south line of Dietz Road; thence continuing along said line 30 feet to a stake and the place of beginning, containing 10.48 acres more or less. Being the same land conveyed by The Board of Trade of the City of Warren to The Supreme Motors Corporation Company October 2nd, 1918, and recorded in Volume 248, page 424 Trumbull County Records of Deeds.

PARCEL No. 2:

Situated in the Township of Howland, County of Trumbull and State of Ohio and known as being part of the original survey of lot Eleven (11) Howland Township and further described as follows:

Beginning at the iron pin at the northwest corner of the lands of The American Welding and Manufacturing Company, at the easterly line of the right of way of the Pennsylvania Railroad; thence north 16° 38′ W. along line of said right of way, a distance of 360.98 feet to an iron pin in the center of a 60 foot east and west road, thence south 87° 46′ E. along the center of said road a distance of 1450.10 feet to the northwest corner of other lands formerly owned by The Supreme Motors Corporation, thence S. 2° 14′ W. a distance of 341.58 feet to an iron pin at the northeast corner of lands owned by The American Welding and Manufacturing Company, thence N. 87° 46′ W. along the north line of lands of The American Welding and Manufacturing Company a distance of 1333.61 feet to the place of beginning, containing 10.92 acres; excepting therefrom a strip 30 feet wide for highway and railroad switches along the westerly side, paralled with the easterly line of the Pennsylvania Railroad right of way.

Being the same land conveyed by The Board of Trade of the City of Warren, Ohio, to The Supreme Motors Corporation Company September 20th, 1919, and recorded in Volume 256, page 184, Trumbull County Records of Deeds.

Plaintiff further says that the defendant, Frank F. Musser, as treasurer of Trumbull County, Ohio, claims an estate or interest therein by way of taxes shown on the tax duplicate or a tax lien or liens arising therefrom, adverse to the plaintiff's right and title, but which estate, interest or liens, plaintiff says, are of no force and effect and are clouds on the title of the property of plaintiff above described.

WHEREFORE, plaintiff prays that defendant may be compelled to show his said estate, interest, taxes or liens, and that the same may be adjudged to be null and void and plaintiff's title quieted against the same, and for all proper relief in the premises.

FILLIUS & FILLIUS AND
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
by ALONZO M. SNYDER,
Attorneys for Plaintiff.

(Duly Verified.)

Praecipe for summons, summons issued pursuant thereto and the return of summons are omitted in printing.

Demurrer to petition filed by defendant March 28, 1929, and the order of the court under date of May 17, 1929, overruling the same, are omitted in printing.

ANSWER.

(Filed in Common Pleas Court June 15, 1929.)

Now comes Frank F. Musser, and admits that he is the duly elected, qualified and acting Treasurer of Trumbull County, Ohio; and that he is as such charged by law with the duty of collecting taxes lawfully assessed, and appearing upon the tax duplicates of Trumbull County.

Answering further, defendant says that his records disclose the following unpaid taxes, together with penalty, interest and fees upon the premises described in plaintiff's petition, to-wit:

1924	Acres	1st Half	Penalty	Interest	Last Half	Penalty	Interest
$1.18	10.48	$667.35	$66.74		$667.35	$66.74	
	10.92	46.43	4.64		46.43	4.64	
1925							
$1.38	10.48	733.50	73.35		733.50	73.35	1237.30
	10.92	50.37	5.03		50.37	5.03	84.97
1926							
$1.44	10.48	863.42	86.34	303.92	863.42	86.34	265.93
	10.92	39.31	3.93	13.84	39.31	3.93	12.11
1927							
$1.58	10.48	947.37	94.74	250.11	947.37	94.74	208.42
	10.92	43.14	4.31	11.39	43.14	4.31	9.49
1928							
$1.52	10.48	911.39	91.14	160.40	911.39	91.14	120.30
	10.92	41.50	4.15	7.30	41.50	4.15	5.48
1929							
$1.60	10.48	959.36	95.94	84.42	959.36		38.37
	10.92	43.68	4.37	3.84	43.68		1.74
Building omitted from duplicate in 1924		17.70					

Total tax	$10,711.34
Total penalty	969.05
Total interest	2,819.33
Adv. and Aud. fees	1.70
Total	$14,501.42

Defendant further says that said taxes are due and unpaid; and that the same are in full force and effect, and a first and best lien against the premises described in plaintiff's petition.

Answering further defendant denies each and every allegation contained in said petition, except such as are herein specifically admitted to be true.

WHEREFORE, Defendant having answered prays the Court that the lien of the State, for taxes against said premises, be protected; that said taxes be declared a first and best lien against said premises; and for such other relief as is just and equitable.

GEO. W. SECREST,
Attorney for Defendant.

(Duly Verified.)

REPLY.

(Filed in Common Pleas Court July 25, 1929.)

Now comes plaintiff by leave of court first had and obtained, and for reply to defendant's answer denies that the taxes alleged therein are in full force and effect, except the taxes of 1928 as hereinafter set forth; denies that they constitute a first and best lien against the premises described in plaintiff's petition and further denies each and every allegation in said answer contained which are not admissions to allegations in plaintiff's petition.

Further replying, plaintiff says that on or about the 24th day of April, A. D. 1928, H. B. Doyle, the duly appointed, qualified and acting Trustee in Bankruptcy of The Sterling Knight Company, which company was then the owner of the property described in plaintiff's petition, filed his certain petition in the United States District Court for the Northern District of Ohio, Eastern Division, to marshall liens and sell real estate, making the following parties defendants therein, to-wit: The Sherwin-Williams Co., The Old Dominion Mortgage Co., The Union Trust Company, Trustee, The Michigan Lubricator Company, The Class Journal Co., The General Aluminum & Brass Manufacturing Co., C. F. Routzahn, Collector of Internal Revenue, State Tax Commission of Ohio, Department of Industrial Relations and the Industrial Commission of Ohio, Western Reserve National Bank, Joseph Hughes, Clerk of Courts, Ohio Public Service Co. and Frank F. Musser, County Treasurer, the defendant herein, praying that an order be granted marshalling the liens upon and interests in said property, determining the validity, amount and priority thereof, ordering its sale at public auction or private sale, as the court might direct, free and clear from all encumbrances and interests, and transferring the rights of the parties to the fund derived from said sale, and further prayed for an order to show cause upon the parties defendant therein, requiring them to set up their rights or be forever barred from asserting the same, and for such other and further relief as in equity was just.

Answers and/or cross petitions were filed on behalf of defendants The Old Dominion Mortgage Co., The Union Trust Company, Trustee, The General Brass Co., The Second National Bank of Warren, Bert Buckley, Treasurer of the State of Ohio, C. F. Routzahn, Collector of Internal Revenue, and Frank F. Musser, Treasurer

of Trumbull County, Ohio, the other defendants being in default for answer or demurrer.

That defendant, Frank F. Musser, County Treasurer, in his answer therein set up all taxes, penalties and interest which had accrued for the years 1924, 1925, 1926 and 1927 respectively, aggregating $9,717.25.

That said court having jurisdiction of the subject matter and all the parties, thereafter on or about June 26, 1928, upon hearing made certain findings and rendered judgment as per Journal Entry duly recorded in the Records of the United States District Court, Northern District of Ohio, Eastern Division, and also recorded as instrument No. 151,979 in the Recorder's Office of Trumbull County, Ohio, a copy of which Journal Entry is hereto attached, marked Exhibit "A" and made a part hereof as if fully rewritten herein.

That said judgment and decree has fully adjudicated the right of defendant Frank F. Musser as County Treasurer in and to the premises herein involved with reference to said taxes set up in his answer filed herein, and that said judgment and decree is still in full force and effect, never having been vacated, modified or reversed, and that thereby this court has no jurisdiction to reconsider or further adjudicate the rights of defendant Frank F. Musser as Treasurer of Trumbull County, Ohio, for taxes against the premises involved in the within suit.

Plaintiff further says that under said decree as aforesaid, H. B. Doyle, Trustee in Bankruptcy, sold said premises free and clear from all liens, claims, incumbrances, including taxes above described, and all rights of all the parties to said suit, to The Union Trust Company, Trustee, for $75,000.00; and that thereafter this plaintiff through divers conveyances became the bona fide purchaser thereof for good and valuable considerations, taking title subject only to taxes for the year 1928 and thereafter.

Plaintiff further says that within the time allowed for the payment of taxes, plaintiff tendered to defendant Frank F. Musser, Treasurer of Trumbull County, Ohio, the sum of $952.89 in full payment of taxes for the first half of 1928, which tender was refused by defendant; that said plaintiff on or before the time for payment of the taxes for the last half of 1928, made a similar tender of $1905.78 for the full year 1928, which tender was also refused and made a similar tender of the first half of the

taxes for the year 1929 and all of the year 1928, which was refused.

Plaintiff further says that he is and has been at all times ready, willing and able to pay the taxes for the year 1928, and of 1929 which have accrued, but that defendant wrongfully and illegally refuses to accept the same.

WHEREFORE plaintiff having fully replied prays that defendant's answer be dismissed, that plaintiff be granted the relief prayed for in his petition, that his rights be fully protected in connection with the tender made for the payment of taxes for the year 1928, and that he be granted such other and further relief as he may be entitled to in law or in equity.

FILLIUS & FILLIUS and
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
Attorneys for Plaintiff.

(Duly verified.)

EXHIBIT "A."

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

IN THE MATTER OF
THE STERLING KNIGHT CO.,
BANKRUPT.

In Bcy. #12838.

H. B. DOYLE, TRUSTEE,
Plaintiff,

vs.

THE SHERWIN-WILLIAMS COMPANY, *et al.*,
Defendants.

ORDER MARSHALLING LIENS AND SALE OF REAL ESTATE AT PUBLIC OR PRIVATE SALE.

This day this cause came on for hearing on the Trustee's Petition to Marshal Liens and Sell Real Estate and the Answers and Cross Petitions of the Sherwin-Williams

Company, The Old Dominion Mortgage Company, The Union Trust Company, Trustee, The Michigan Lubricator Company and The General Brass Company, C. F. Routzahn, Collector of Internal Revenue for United States, Second National Bank of Warren, Frank F. Musser, County Treasurer, Trumbull County, and the Answers of the Trustee to the various Cross Petitions.

The court after hearing the evidence and having carefully examined the proceedings and being fully advised in the premises finds that The Union Trust Company, Trustee, has a good, valid and subsisting lien on the real estate described in its mortgage, and that the same is a first lien upon said property in the sum of $231,000. That The Old Dominion Mortgage Company has a good, valid and subsisting lien upon the property described in its mortgage, and that the same is a second lien upon said property in the sum of $18,999.00.

That the claim of The Old Dominion Mortgage Company and the claim of The Second National Bank of Warren, Ohio, arise out of the same transaction and exist by virtue of the notes and mortgage executed by The Old Dominion Mortgage Company and to which The Second National Bank claimed to have some rights and their claims are identical, and inasmuch as the mortgage is recorded in the name of The Old Dominion Mortgage Company this order will decree the lien to be in The Old Dominion Mortgage Company.

That C. F. Routzahn, Collector of Internal Revenue for United States has a good, valid and subsisting lien upon the real estate described in Trustee's Petition to Marshal Liens in the sum of $17,266.00. That the State Tax Commission of Ohio has a good and valid lien on the property described in Trustee's Petition in the sum of $6,037.50. That Frank F. Musser, Treasurer of Trumbull County, has a good and valid lien upon the property described in said Trustee's Petition in the amount of $9,717.25.

That the said liens of the United States government, the State of Ohio and Trumbull County are of equal priority and are the third lien upon the property described in Trustee's Petition.

That The Sherwin-Williams Company have a good and valid lien upon said real estate described in Trustee's Petition in the sum of $156.40, and that the same is fourth in order of priority.

That the Second National Bank claim being identical with The Old Dominion Mortgage Company claim and The Old Dominion Mortgage Company claim being a matter of record and the court having found that The Old Dominion Mortgage Company has a lien by virtue of said claim, The Second National Bank is found to have no lien.

That The Class Journal Company being in default for pleading is found to have no lien against the premises described in Trustee's Petition. That The General Aluminum & Brass Manufacturing Company claiming a lien by virtue of a judgment secured on March 14, 1927, being after the filing of the bankruptcy petition, is found to have no lien. That The Michigan Lubricator Company claiming a lien by virtue of a judgment secured on April 13, 1927, said judgment being secured after the filing of the petition in bankruptcy, is found to be no lien upon the premises described herein.

That the rights and priority of the lienors as hereinbefore stated be and they hereby are transferred to the fund derived from the sale of said property, and the Trustee is hereby authorized and directed to offer said property at public auction on the premises on the 10th day of July, A. D. 1928, beginning at two o'clock in the afternoon and to make due return of his proceedings under this order.

PAUL E. CARSON,
Referee.

Demurrer to reply filed September 3, 1929, and order of the court under date of October 5, 1929, overruling the same, are omitted in printing.

The agreed statement of facts filed February 24, 1930, is omitted in printing as the Court of Appeals made a finding of fact which is printed *infra*, Page 19.

DECREE AND JUDGMENT OF THE COMMON PLEAS COURT.

(Filed March 28, 1930.)

Journal 84, Page 311.

March 28, 1930.

This cause came on for hearing before the Court upon the petition of plaintiff, the answer of the defendant, the reply, the agreed statement of facts of the parties duly submitted and the arguments and brief of counsel, and upon consideration whereof the Court finds that at the time of the institution of this action the plaintiff I. J. Van Huffel was and still is the owner of and in possession of real estate described in the petition; that the defendant Trace D. Harkelrode is the duly elected, qualified and acting treasurer of Trumbull County, Ohio, having succeeded defendant Frank F. Musser in such office, and that the former defendant Musser, who was the duly elected, qualified and acting treasurer of this county, was such treasurer at the institution of this action and during the time of the bankruptcy proceedings hereinafter referred to; that the plaintiff herein derives his title to the real estate in the petition described mediately from H. B. Doyle as trustee in bankruptcy of The Sterling-Knight Company, and that at the time of the institution of the bankruptcy proceedings referred to The Sterling-Knight Company was the owner in fee simple and in possession of said real estate; that notice of the pendency of the bankruptcy proceedings against The Sterling-Knight Company was given to the defendant Frank F. Musser, County Treasurer, prior to the time of final hearing in said matter and that the said Frank F. Musser mailed to Paul E. Carson, Referee in Bankruptcy, a statement of taxes due on said real estate at the time; that notice of the sale of the property herein was duly received by said Frank F. Musser as County Treasurer, and no further answer or cross petition was filed in said cause on behalf of said treasurer, nor was he represented by counsel nor was he himself present at any of the hearings; that said bankrupt estate has been fully adminstered and closed and that no proceedings for review or appeal were filed within the time limit therefor in said bankruptcy proceedings, being Cause No. 12838 on the Bankrupt Docket of the District Court of the United States for the Northern District of Ohio, Eastern Division; that the county taxes of Trumbull County,

Ohio, for the years 1924, 1925, 1926 and 1927 were charged on the tax duplicate of said county and effective at the time of the bankruptcy proceedings herein referred to and that the penalties and interest thereon for such years have been added to the amount since the institution of such proceedings by reason of the non-payment of the amounts listed as such taxes; that the amount of taxes for the years 1924 and 1925 were certified delinquent in February 1926; that none of the amounts listed in defendant's Exhibit A as taxes, penalties and interest have been paid; that in January 1929 and before the final due date thereof the plaintiff tendered to Frank F. Musser as County Treasurer the sum of $952.89 in payment of taxes for the first half of the year 1928 against the real estate described in the petition. On July 20, 1929 and before the final due date thereof the plaintiff duly tendered to defendant Frank F. Musser the sum of $1905.78 in payment of taxes for the full year 1928 against the real estate in the petition described, and on January 20, 1930 the plaintiff duly tendered to the defendant Trace D. Harkelrode, County Treasurer, the sum of $3172.47 in full payment of the taxes against the real estate described in the petition for the full year 1928 and for the full year 1929 upon a reduced valuation of $79,168.00 for such real estate, as claimed by the plaintiff to be the true value thereof in money in a complaint theretofore filed by the plaintiff with the Auditor of Trumbull County, Ohio, in accordance with the provision of law for the contest of assessed values for tax purposes; that each of such tenders was refused for the stated reason that previous taxes as listed had not been paid.

The Court finds that the allegations of the petition are true and that the plaintiff herein is the owner in fee simple of the property in the petition described and that his title thereto should be and hereby is quieted as against the pretended claim of the Treasurer of Trumbull County, Ohio, for the taxes and penalties thereon for the years 1924, 1925 and 1926 and 1927 and the said taxes and penalties are hereby ordered cancelled and discharged; that the taxes for the year 1928 in the sum of $1905.78 without penalties or interest, are a lien upon said real estate; that the taxes for the year 1929, as yet undetermined and which cannot be determined until the complaint filed by the plaintiff with the Auditor of Trumbull County for contest of assessed valuation for tax purposes is determined, are a lien upon said real estate; that upon the payment by the plaintiff to the defendant

Harkelrode as Treasurer of taxes for the year 1928 without penalty or interest, $1905.78 and the payment of taxes to the defendant Harkelrode on said property for the year 1929 as heretofore tendered to defendant Harkelrode, Treasurer, by plaintiff without penalty or interest, shall fully release said property from all liens now held by the said defendant Harkelrode as Treasurer against said property for taxes of any and all kinds and descriptions as shown upon the tax duplicate of said Trumbull County, Ohio, except such further amount of taxes for the year 1929, if any, as may be found to be due thereon on the final determination of the complaint filed by plaintiff with the Auditor of Trumbull County, Ohio, for contest of assessed valuation for tax purposes on said property for that year. And thereupon the title to said property shall be fully quieted in plaintiff without lien or claim of any kind thereon by any person defendant to this action except as herein noted.

It is further ORDERED that the defendant Harkelrode as Treasurer of Trumbull County, Ohio shall strike off from the tax lists as held by him the taxes and penalties upon said property for the years 1924, 1925, 1926 and 1927 and mark them cancelled and discharged and the Auditor of Trumbull County, Ohio, is hereby ordered to strike from the tax duplicate of Trumbull County, Ohio, the taxes and penalties appearing upon said books on said property for the years 1924, 1925, 1926 and 1927 and to mark the same cancelled and discharged by order of Court.

It is further ORDERED that the Clerk of Courts transmit to both the Treasurer and Auditor of Trumbull County, Ohio, a certified copy of this Journal Entry.

Plaintiff to pay costs. Defendant excepts.

NOTICE OF APPEAL

(Filed in Common Pleas Court, April 7, 1930.)

NOTICE IS HEREBY GIVEN That the defendant, Trace D. Harkelrode, has appealed the finding of the Court of Common Pleas in this cause to the Court of Appeals of this County.

G. H. BIRRELL AND GEO. W. SECREST,
Attorneys for Defendant.

April 3rd, 1930.

We, being attorneys of record for the Plaintiff, I. J. VanHuffel, hereby acknowledge receipt of the foregoing notice of appeal.

FILLIUS & FILLIUS,
Attorneys for Plaintiff.

OPINION OF THE COURT OF APPEALS.

(Filed June 4, 1930.)

POLLOCK, *J.*:

This action comes into this Court on appeal, and was submitted on the pleadings and an agreed statement of facts.

The plaintiff in this action is seeking to have his title quieted to the real estate described in the petition against taxes claimed by the defendant Treasurer to be due Trumbull County for the years 1924, 1925, 1926 and 1927, amounting to $9717.25.

An answer was filed by the Treasurer claiming that the taxes which the plaintiff seeks to have his title quieted against were taxes accruing and unpaid for the years above mentioned.

We learn from the pleadings and the agreed statement of facts that The Sterling-Knight Company was adjudged a bankrupt on May 13, 1927, and that the real estate described in the petition was a part of the bankrupt's estate at the time of the adjudication in bankruptcy. Afterwards, on October 28, 1927, at an election held before Paul E. Carson, Referee in Bankruptcy, H. B. Doyle was elected trustee of said estate, and gave bond and qualified.

On March the 28th, 1928, the trustee in bankruptcy filed a petition in bankruptcy, making the lien-holders, including the then Treasurer of Trumbull County, parties in said action, describing said real estate, asking that an order may be granted marshalling the liens upon said property, determining the validity and priority thereof, and further asking for an order of sale of said real estate either at public or private sale, free and clear of all incumbrances and interest, and transferring the rights of the parties to the fund derived from said sale.

The real estate described in this petition is the same real estate now owned by the plaintiff in this action, and for which he is asking that his title be quieted.

On the filing of this application, the Referee in Bankruptcy issued his notice of the filing and the purpose thereof to all creditors of said bankrupt, and also a further notice of the time of the hearing of the application, which notices were served upon the defendant Treasurer of Trumbull County.

The Treasurer of Trumbull County, before the time set for the hearing, filed with the Referee in Bankruptcy, a statement of the taxes then accrued on the property and unpaid, being for the beforementioned taxes. The Treasurer did not otherwise appear in the bankruptcy proceedings.

After the hearing, the Referee in Bankruptcy marshalled the liens on this real estate, finding that The Union Trust Company, as Trustee, had the first lien thereon in the sum of $231,000.00; that the Old Dominion Mortgage was the second lien thereon in the sum of $18,999.00, and that the claims of the United States Government, the State of Ohio and Trumbull County are of equal priority and have the third lien upon the property described. The Referee further ordered that the rights and priority of the lien-holders be transferred to the fund derived from the sale of the property, and that the Trustee is authorized and directed to offer said property for sale at public auction. There was also a supplemental order issued that the purchaser may use and apply towards the payment of the purchase price for said real estate any of the bonds secured by the first mortgage indenture between The Sterling-Knight Company and The Union Trust Company, Trustee.

Afterwards the Trustee in Bankruptcy returned the order of sale that he had sold the property to The Union Trust Company, Trustee, for $75,000.00 and that the Trust Company had tendered in payment the bonds of the Sterling-Knight Company in the amount of $200,000.00, in payment of the purchase money of the above described property.

Afterwards, the Trustee was ordered to convey this property to The Union Trust Company in obedience to the former order of sale, which was done, and the plaintiff's title to the property comes through conveyances from The Union Trust Company. The Union Trust Company did not pay the purchase price bid for the property except by the surrender and cancellation of said bonds.

The taxes due Trumbull County for the years involved in this action was not paid by the Trustee in Bank-

ruptcy, or in any way cancelled, except by the finding of the Referee in Bankruptcy that these taxes were a third lien upon the real estate on which they were assessed. The Trustee received from the sale of other property of the bankrupt estate sufficient money to more than pay the taxes due on the real estate.

We then come to the question whether this order in the bankruptcy proceeding is a valid and binding disposition of the taxes on this property, and that the property, upon which it accrued, is relieved of the burden of the payment of taxes or whether the order and finding in the bankruptcy proceeding is void.

The first question to be determined is whether the judgment of the bankruptcy proceeding can be questioned in a collateral proceeding.

> "Although a court may possess jurisdiction of a cause of the subject matter and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judiciously in all things, and cannot then transcend the power conferred by law."
>
> *Windsor v. McVeigh*, 93 U. S. 274-282, 23 L. Ed. 917.

When a court has jurisdiction, whether its decision is correct or otherwise, the judgment is binding on every other court, "but if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." *Elliot v. Piersol*, First Peters, 328-340. To the same effect is *Freeman on Judgments*, Section 117, and *Black on Judgments*, Section 170.

—A bankruptcy court has only such powers and jurisdictions as is conferred by statute, or such as are necessarily implied from such statutes.

> "Bankruptcy Courts, like all other national courts, although not courts of inferior jurisdiction, are courts of limited jurisdiction. They are creatures of the statute, and possess no powers except those conferred upon them either expressly or by necessary implication."
>
> *In re Williams*, 120 Federal, 38;
>
> *Wilson v. U. S.*, 228 Federal, 344-351.

Section 64-a of the Bankruptcy Law reads as follows:

> "Debts which have priority—The Court shall order the trustee to pay all taxes legally due and

owing by the bankrupt to the United States, State, County, District, or Municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the Court."

The power of the state to levy and collect taxes and also the procedure of collecting are inherent in the State.

Western Union Telegraph Company v. Mayer, 28 O. S. 521-533;

City of Cleveland v. Edwards, 109 O. S. 598.

"In the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power."

Union Pacific R. R. Co. v. Peniston, 18 Wall. 530 (21 L. Ed. 791).

"The right to levy and collect taxes has always been recognized as one of the supreme powers of the state, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen."

Leigh v. Green, 193 U. S. 79-87 (48 L. Ed. 626).

The only power or jurisdiction that the bankruptcy court has over state taxes is contained in the provisions of Section 64-a, *supra*. That section directs that the Referee shall order the Trustee to pay all the taxes due a state or county before he pays the creditors. The only further duty that the court has if there is a question as to the amount or legality of such taxes, to hear and determine these questions.

"A lien for taxes does not, however, stand upon the footing of an ordinary encumbrance, and is not displaced by a sale under a pre-existing judgment or

decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale, pursuant to the statute prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title."

Lake Superior R. R. Co. v. United States, 93 U. S. 424 (23 L. Ed. 965).

"The requirement of the present law is a wide departure from the Act of 1867, and specifically obliges the Trustee to pay all taxes legally due and owing without distinction between United States and the State, County, District, or municipality."

New Jersey v. Anderson, 203 U. S. 483-489 (51 L. Ed. 297).

"The bankruptcy act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546."

In re Anderson, 279 Fed. 525-529.

Section 5671 of the General Code of this State reads as follows, so far as we need refer to it:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid."

Under this provision of the Code, when taxes accrue against real estate, they become a lien upon the real estate until paid.

"By virtue of the above section, the lien of the state for taxes is paramount to all other liens."

Trust Company v. Root, 72 O. S. 535.

"Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of

the state), is sold to the mortgageee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured."

In re Veitch, et al., 101 Fed. 251.

We think that it appears from the authorities referred to that the bankruptcy court had no power or jurisdiction to relieve the real estate belonging to the bankruptcy estate from the taxes then accrued and due Trumbull County by any order that it could make except by ordering the Trustee to pay the taxes, and that the taxes for the years referred to are yet a lien on the real estate and the Treasurer of Trumbull County has a right to collect such taxes from the real estate in any way authorized by the laws of this State.

It follows that judgment must be entered for the defendant, and plaintiff's petition dismissed. Exceptions noted.

If a motion for a new trial is filed, it is overruled, and exceptions noted.

Farr, and Roberts, *JJ.*, concur in the judgment.

MOTION FOR NEW TRIAL.

(Filed in the Court of Appeals June 7, 1930.)

Plaintiff moves the court for a new trial on the grounds that the decision and judgment of the Court herein are contrary to law and are against the weight of the evidence.

A. M. SNYDER,
Attorney for Plaintiff.

SUPPLEMENTAL REPLY.

(Filed in Court of Appeals Sept. 17, 1930.)

Now comes the plaintiff and by leave of court first had and obtained to file this his supplemental reply says:

That notwithstanding the fact that the trustee in bankruptcy had in his hands funds derived from sources other than the sale of mortgaged property out of which, under the bankruptcy laws, the whole or a part of the taxes now claimed by the defendant might and should have been first paid, the defendant and his predecessor in office made no application to the bankruptcy court to have the taxes now claimed to be due him for the years 1924, 1925, 1926 and 1927 paid from such funds.

WHEREFORE plaintiff prays as in his petition.

SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
FILLIUS & FILLIUS,
Attorneys for Plaintiff.

(Duly verified)

DECREE AND JUDGMENT OF THE COURT OF APPEALS.

(Entered Sept. 17, 1930.)

Journal 2, p. 201, Sept. 17, 1930.

And now this cause came on to be heard upon the appeal of the defendant from the judgment of the Common Pleas Court of Trumbull County, Ohio, and upon consideration of the petition, answer, reply, the agreed statement of facts, the arguments and briefs of counsel, the court finds that:

FINDINGS OF FACT.

1. On and for some time prior to the 13th day of May, 1927 The Sterling-Knight Company was the owner and was in possession of the real estate described in plaintiff's petition, and on said day The Sterling-Knight Company was by the United States District Court for the Northern District of Ohio, Eastern Division, duly adjudged a bankrupt, Bankruptcy Cause No. 12838, and the administration of its estate referred to Paul E. Carson, the duly appointed, qualified and acting Referee in Bankruptcy at Youngstown, Ohio.

2. On the 28th day of October, 1927, at a meeting duly held for such purpose, H. B. Doyle of Youngstown, Ohio, was duly elected Trustee of the bankrupt estate, and he qualified as such by giving bond in the sum of $30,000 with the United States Fidelity & Guaranty Company as surety, for the faithful performance of his official duties as such Trustee, which bond was accepted and approved by the Referee.

3. On the 24th day of April, 1928, the Trustee filed his petition with the Referee for an order to marshal the liens upon and to sell the property of the bankrupt, including the real estate described in plaintiff's petition herein, and for the transfer of all liens thereon to the fund to be derived from the sale thereof, making as parties defendant to such petition all those who claimed any lien upon such property, including the property described in plaintiff's petition herein, which parties included among others Frank F. Musser, the then duly elected, qualified and acting Treasurer of Trumbull County, Ohio, the State Tax Commission of Ohio, and C. F. Routzahn, the Collector of Internal Revenue for the Eighteenth Collection District of Ohio.

4. Upon the filing of such petition the Referee, in the manner and form as provided by the Bankruptcy Laws of the United States mailed to all known creditors of the bankrupt, including the Treasurer of Trumbull County, Ohio, the following notice:

"In Bankruptcy

In the Matter of The Sterling Knight Company, Bankrupt.	Notice of Application for Leave to Sell Assets and Marshal Liens.

To all Creditors of said Bankrupt:

Take notice that the trustee herein has filed his application for leave to sell at public or private sale free and clear of all incumbrances real estate, buildings and building equipment. Property located at Howland Twp. at City of Warren limits, containing 21 acres. For better description see Trustee's Petition to sell.

Belonging to the above estate, and that said application will be for hearing before the undersigned

Referee in Bankruptcy at his offices 310-11-12 Home Savings & Loan Building, in the City of Youngstown, Ohio in said District on May 4, 1928 at 10 o'clock in the forenoon, at which time and place any person interested may appear and show cause, if any they have, why an order authorizing such sale should not be granted.

PAUL E. CARSON,
Referee in Bankruptcy."

And the Referee, upon the filing of such petition, mailed to those named as claiming any lien on the property therein described, including the Treasurer of Trumbull County, Ohio, the following notice:

"IN THE DISTRICT COURT OF THE UNITED STATES.
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

IN THE MATTER OF THE STERLING KNIGHT CO., BANKRUPT.	IN BANKRUPTCY NOTICE OF APPLICATION FOR LEAVE TO SELL ASSETS AND MARSHAL LIENS.

To all creditors of said bankrupt:

Take Notice that the trustee herein has filed his application for leave to sell at public or private sale free and clear of all incumbrances real estate, buildings and building equipment. Property located in Howland Twp. at City of Warren limits, containing 21 acres. For better description see Trustee's petition to sell. Belonging to above estate and that said application will be for hearing before the undersigned Referee in Bankruptcy, at his offices, 310-11-12 Home Savings and Loan Building, in the City of Youngstown, Ohio, in said District, on May 4, 1928 at 10 o'clock in the forenoon, at which time and place any person interested may appear and show cause, if any they have, why an order authorizing such sale should not be granted.

PAUL E. CARSON,
Referee in Bankruptcy.

Unless your interest is set up by proper pleading at or prior to said hearing an order will be entered finding that you have no lien."

Both of the notices so mailed were received by the then Treasurer of Trumbull County, Ohio, who upon receipt thereof mailed to the Referee a statement of the taxes due upon the real estate described in the Trustee's petition to sell, being the same as that described in plaintiff's petition herein, which statements, received and filed by the Referee on April 30, 1928, showed that there was then due to the Treasurer of Trumbull County, Ohio, for taxes upon the same for the years 1924, 1925, 1926 and 1927 the sum of $9,717.25, including interest and penalty to such date. Other lien holders named as parties defendant in the Trustee's petition to sell likewise filed a statement of their claims, including Bert B. Buckley, the duly elected, qualified and acting Treasurer of the State of Ohio, who filed a statement of claim on April 30, 1928 to the effect that the bankrupt was indebted to the State of Ohio for franchise fee and penalty for the year 1924 in the sum of $6,037.50, and C. F. Routzahn, Collector of Internal Revenue for the Eighteenth Collection District of Ohio on May 16, 1928 filed his statement of claim setting forth that there was due to the United States the sum of $17,266.00 for manufacturer's excise tax for the period from May 1924 to June 1925 inclusive, for which a lien had been filed with the Recorder of Trumbull County, Ohio, August 10, 1925.

5. On the 16th day of June 1928 the Referee entered an order reciting that the petition of the Trustee to marshal liens and to sell the real estate of the bankrupt came on for hearing, together with the answers and cross petitions of Frank F. Musser, County Treasurer of Trumbull County, Ohio, and other lien holders, and that after hearing the evidence and examining the same the Referee found that The Union Trust Company, Trustee, of Cleveland, Ohio, by virtue of a deed of trust dated June 1, 1923, had a good and valid first lien upon the property in the sum of $231,000.00; that the Old Dominion Mortgage Company of Cleveland, Ohio, by virtue of a deed of trust dated October 31, 1924, had a good and valid second lien upon the property in the sum of $18,999.00; that Frank F. Musser, County Treasurer, had a good and valid lien upon the premises in the sum of $9,717.25, that the State of Ohio had a good and valid

lien upon the premises in the sum of $6,037.50 and that C. F. Routzahn, Collector of Internal Revenue of the United States, had a good and valid lien upon the premises in the sum of $17,266.00; that the lien of C. F. Routzahn, Collector of Internal Revenue, and the lien of Bert B. Buckley, Treasurer of the State of Ohio, and the lien of Frank F. Musser, Treasurer of Trumbull County, Ohio, were of equal priority and were the third lien upon the property described in the Trustee's petition to sell, being the same as that described in the petition herein. The Referee further ordered that the liens and rights of the lien holders be transferred from the real estate to the fund to be derived from the sale thereof, and that the Trustee be and he thereby was authorized and directed to offer the real estate for sale at public auction on the 10th day of July 1928, free and clear of all liens and incumbrances. At none of the hearings in the bankruptcy proceedings was the defendant Frank F. Musser, County Treasurer, present in person or represented by legal counsel and with the exception of the notice recited in finding of fact numbered 6 herein neither the said Frank F. Musser, County Treasurer, nor the Prosecuting Attorney's Office had actual knowledge of the finding of the court determining the priority of liens until on or about the 12th day of February 1929.

6. On the 29th day of June 1928 the Referee mailed to all the creditors of The Sterling-Knight Company the following notice:

"In the District Court of the United States.
Northern District of Ohio,
Eastern Division.

In Bankruptcy

In the Matter of
The Sterling Knight Co.,
Bankrupt.
} Notice of Sale.

To all Creditors of said Bankrupt:

Notice is hereby given that the Trustees herein will sell at Public Sale on July 10, 1928, at 2:00 o'clock P. M., at No. ..... on premises Warren, Ohio, the following property belonging to said bankrupt's estate:

Real Estate, buildings and building equipment. Property located in Howland Twp. at city of Warren limits, containing 21 acres. For better description see Trustee's petition to sell.

PAUL E. CARSON,
Referee in Bankruptcy.

Youngstown, Ohio, June 29, 1928."

which notice was received by the then Treasurer of Trumbull County, Ohio.

7. On July 12, 1928 the Trustee reported to the Referee that on July 10, 1928 and at the appointed time he offered the real estate of the bankrupt for sale pursuant to previous orders of the Referee, and that the highest and best offer obtainable was an offer from The Union Trust Company, Trustee, of Cleveland, Ohio, for the sum of $75,000.00. The Referee, upon consideration of such report and on the 12th day of July 1928, approved and confirmed the same and ordered that the offer of The Union Trust Company, Trustee, of Cleveland, Ohio, be accepted and directed the Trustee to forthwith execute proper instruments of title upon receipt of the payment of the purchase money.

8. Thereafter and on the 5th day of September 1928 the Trustee conveyed the real estate in question to The Union Trust Company, Trustee, of Cleveland, Ohio, and on the 7th day of September 1928 The Union Trust Company, Trustee, of Cleveland, Ohio, conveyed the same to the Warren-Cleveland Company, an Ohio corporation. On the 5th day of October 1928 the Warren-Cleveland Company conveyed the premises to I. J. Van Huffel, free and clear of all encumbrances excepting taxes for the year 1928, which I. J. Van Huffel assumed and agreed to pay.

9. I. J. Van Huffel, plaintiff in this action, was at the time of instituting these proceedings and still is the owner and in possession of the real estate aforesaid, which is the same as that described in his petition herein.

10. On January 19, 1929, and before the final due date thereof, plaintiff tendered to Frank F. Musser, the then duly elected, qualified and acting Treasurer of Trumbull County, Ohio, the sum of $952.89 in payment of the taxes due for the first half of the year 1928 upon the real estate herein involved, and on July 20, 1929, and before the final due date thereof, the plaintiff duly

tendered to the defendant, Frank F. Musser, the then Treasurer of Trumbull County, Ohio, the sum of $1905.78 in payment of taxes for the full year 1928 and upon the real estate herein involved. Shortly thereafter the term of office of Frank F. Musser as County Treasurer of Trumbull County, Ohio, expired and Trace D. Harkelrode was elected to succeed the said Frank F. Musser and he duly qualified as such and has been substituted as party defendant for the said Frank F. Musser herein, and he is now the duly elected, qualified and acting Treasurer of Trumbull County, Ohio. On January 20, 1930, the plaintiff duly tendered to the defendant, Trace D. Harkelrode, as County Treasurer, the sum of $3172.47 in full payment of taxes upon the real estate herein involved for the full year 1928 and for the full year 1929, the tender for the latter year being upon a reduced valuation in the amount of $79,168.00 for such real estate, as claimed by the plaintiff to be the true value thereof in money in a complaint theretofore filed by the plaintiff with the Auditor of Trumbull County, Ohio, for the protest of assessed valuation for tax purposes. Each of the tenders so made to Frank F. Musser and his successor in office, Trace D. Harkelrode, were refused for the stated reason that previous taxes for the years 1924, 1925, 1926 and 1927 had not been paid.

11. The plaintiff, I. J. Van Huffel, has at all times been and is now ready, willing and able and offers to pay the amounts so tendered by him or such other amounts as may be properly assessed against the real estate herein involved for the years 1928 and 1929.

12. On February 21, 1929 H. B. Doyle, as Trustee in Bankruptcy, filed his final account with the Referee in Bankruptcy which shows the following receipts:

Public sale of real estate	$ 75,000.00
Sale of mortgaged personal property	96,527.30
Refund from United States Government	2,500.00
Miscellaneous	44.46
Total	$174,071.76

and that the amounts received from the sale of real estate and mortgaged personal property were paid to the first and second mortgage holders in accordance with the order of the Referee in Bankruptcy, except a sufficient amount thereof which, together with the $2500.00 and

$44.46 of unencumbered funds, was necessary to pay the costs of administration. The costs of administration totalled $19,171.46 including attorneys' fees, Referee's fees of $1850.00 and Trustee's fees of $1850.00, which two latter disbursements were made July 24, 1928. All disbursements made by Trustee in Bankruptcy except attorneys' fees and State and Federal Court Receivers' compensation, which three items aggregated $6,526.12, were made prior to January 1, 1929. Frank F. Musser, the Treasurer of Trumbull County and his successor in office made no application other than the statement of claim referred to in paragraph 4 hereof to Bankruptcy Court to have the taxes for the years 1924, 1925, 1926 and 1927 paid out of any of the funds in the hands of the Trustee. On the 15th day of March 1929 the final report of H. B. Doyle, Trustee in Bankruptcy, was approved and confirmed by the Referee in Bankruptcy and H. B. Doyle as Trustee was discharged from any further duties therein, and the bankrupt estate of The Sterling-Knight Company was closed.

13. Taxes due the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927 upon the real estate herein involved have not been paid. No exceptions were taken by the Treasurer of Trumbull County, Ohio, to any of the proceedings had in the bankruptcy court, nor within the time limited by law therefor was any petition to review any of the rulings of the Referee filed in the United States District Court.

CONCLUSIONS OF LAW.

1. The Bankruptcy Court had no power or jurisdiction to relieve the real estate belonging to the bankrupt estate of The Sterling-Knight Company from the taxes which, with penalty and interest had accrued at the time the real estate was ordered to be sold, and consequently taxes due to the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927, plus penalty and interest, are still a lien upon the real estate described in plaintiff's petition, which can be collected in the manner authorized by the laws of the State of Ohio.

2. The fact that taxes for the years 1924, 1925, 1926 and 1927, plus penalty and interest, were a lien upon the property described in plaintiff's petition and were due and payable did not justify the Treasurer of Trumbull County in refusing to accept from plaintiff, I. J. Van

Huffel, the payment of the taxes for the years 1928 and 1929 when payment of the same, as herein-above found, was tendered.

3. Taxes due the Treasurer of Trumbull County for the year 1928 upon the real estate described in plaintiff's petition are still a lien thereon but without penalty or interest.

4. Taxes for the year 1929 are a lien upon the real estate described in plaintiff's petition and are to be determined by the Auditor according to law upon the determination of the complaint filed by plaintiff with the Auditor of Trumbull County upon the assessed valuation for tax purposes of said property for the year 1929.

It is by the court, therefore,

ORDERED, ADJUDGED AND DECREED that plaintiff's petition be and the same hereby is dismissed and that the defendant have and recover from the plaintiff his costs herein expended taxed at $.....

To all of which the plaintiff, I. J. Van Huffel, excepts, and his motion for a new trial is overruled, to which he likewise excepts.

Approved:

JOHN POLLOCK,
Presiding Judge.

CERTIFIED TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

In the Supreme Court of the State of Ohio.

(Filed in the Court of Appeals April 2, 1931.)

DOCKET ENTRIES.

Oct. 14, 1930. Petition in error as of right, Waiver of Summons and entry of appearance filed.

Oct. 14, 1930. Court of Appeals Transcript, Common Pleas Court Transcript and Original Papers filed.

Oct. 14, 1930. Motion for an order to certify record, Pltffs. printed briefs on motion, Notice and Proof of Service filed.

Oct. 22, 1930. Stipulation for postponing the printing of record filed.

Dec. 2, 1930. Defendants printed brief filed. 12-3-30 P.S. filed.

Dec. 2, 1930. Motion by Defendant to dismiss Petition in Error as of right filed, notice and proof of service filed.

Dec. 9, 1930. Pltffs. printed reply brief and Additional Authorities filed.

Dec. 24, 1930. Petition in error dismissed, No debatable constitutional question involved. J. 32 P. 299.

Dec. 24, 1930. Motion for an order directing the Court of Appeals of Trumbull County to certify its record, Overruled. J. 32 P. 294.

Dec. 24, 1930. Motion by defendant to dismiss petition in error as of right, Sustained. J. 32-294.

Dec. 27, 1930. Original papers sent to Snyder, Ford, Thomsen, Seagrave & Roudebush..

Jan. 2, 1931. MANDATE ISSUED.

Jan. 2, 1931. CERTIFIED COPY OF ENTRY SENT CLERK.

Jan. 16, 1931. Application for re-hearing filed.

Feb. 7, 1931. Re-hearing Denied. J. 32—P. 316.

JOURNAL ENTRIES.

December 24, 1930. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas. etc., Motion for an order directing the Court of Appeals of Trumbull County to certify record. It is ordered by the Court that this motion be and the same hereby is overruled. J. 32 P. 294.

December 24, 1930. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas. etc., Motion by defendant to dismiss petition in error as of right. It is ordered by the Court that this motion be and the same hereby is sustained. J. 32 P. 294.

December 24, 1930. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas. etc. Error to the Court of Appeals of Trumbull County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Trumbull County, upon the motion of defendant in error to dismiss the petition in error, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said petition in error be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $.....

Ordered, That a special mandate be sent to the Court of Appeals of Trumbull County, to carry this judgment into execution. J. 32 P. 299.

February 7, 1931. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas., etc. It is ordered by the Court that the Application for rehearing in the above entitled cause be and the same hereby is, denied. J. 32 P. 316.

(Duly certified)

CERTIFICATE OF THE CLERK.

STATE OF OHIO,
TRUMBULL COUNTY, ss.

I, Luther Campbell, Clerk of the Court of Appeals in and for the County of Trumbull, State of Ohio, do hereby certify that the foregoing is a true, full and correct copy, except as to the omissions therein indicated, of the record and proceedings had in the case of I. J. Van Huffel, Plaintiff, v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, Defendant, being cause No. 613, as the same appears in the files and upon the records of the Court of Appeals of Trumbull County, Ohio, now in my custody and control.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court of Appeals of Trumbull County, Ohio, this 14th day of April, 1931.

LUTHER CAMPBELL,
Clerk of the Court of Appeals of Trumbull County, Ohio.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 25, 1931

The petition herein for a writ of certiorari to the Court of Appeals of Trumbull County, State of Ohio, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(798)

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No.....

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, successor in office and substituted as party defendant for Frank F. Musser, Former Treasurer of Trumbull County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI

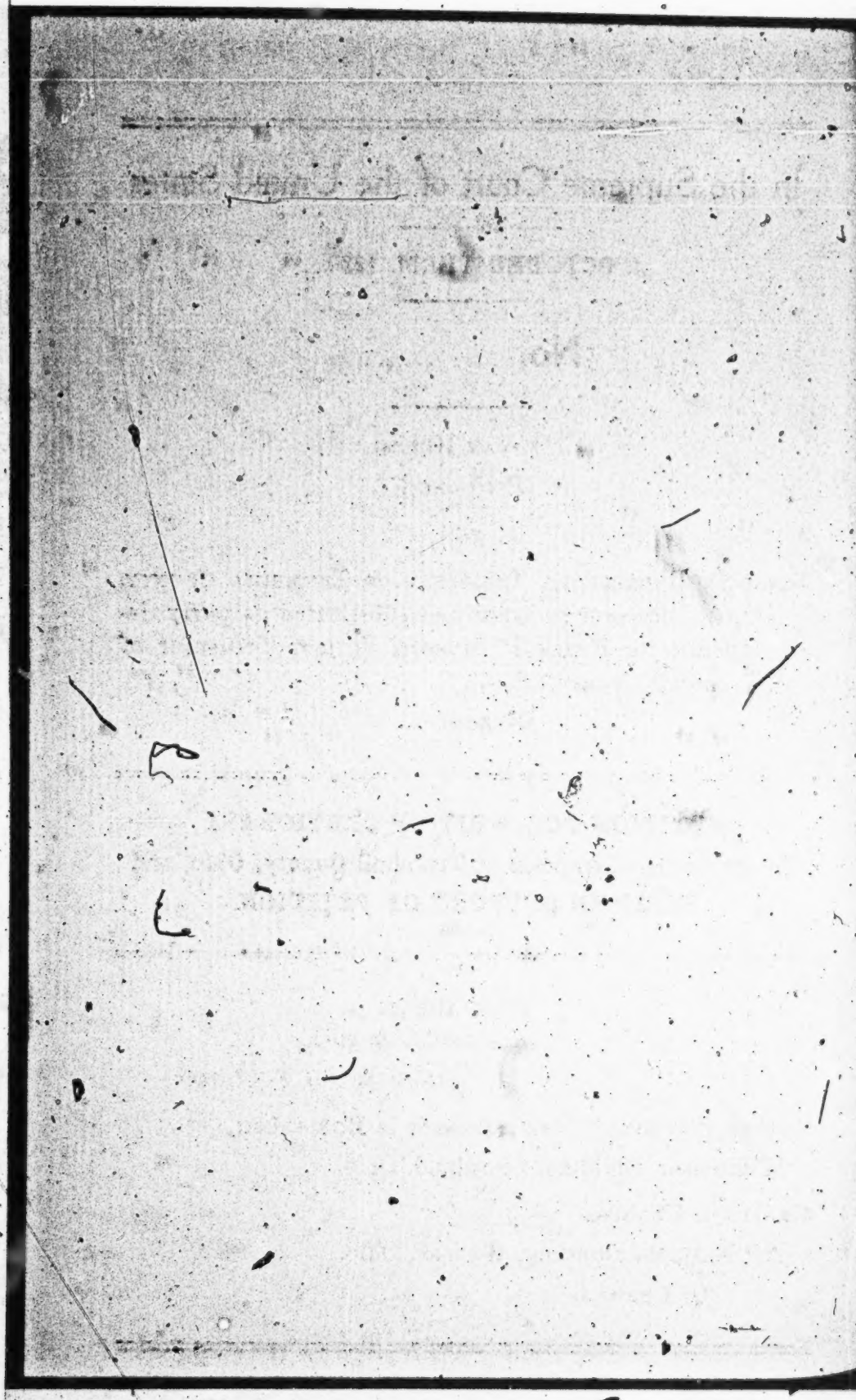
To the Court of Appeals of Trumbull County, Ohio, and

BRIEF IN SUPPORT OF PETITION.

H. H. HOPPE,
ALONZO M. SNYDER,
Attorneys for Petitioner.

SNYDER, THOMSEN, FORD, SEAGRAVE & ROUDEBUSH,
Williamson Building, Cleveland, Ohio,

FILLIUS & FILLIUS,
2nd National Building, Warren, Ohio,
Of Counsel.



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In the Supreme Court of the United States

OCTOBER TERM, 1930.

No.....

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, successor in office and substituted as party defendant for Frank F. Musser, Former Treasurer of Trumbull County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Trumbull County, Ohio.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of I. J. Van Huffel respectfully shows unto this Honorable Court:

A.
SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action to quiet the title (R. 1) of petitioner to certain real estate owned by him and of which he is in possession, against the claim (R. 3) of the respondent, who claims a lien thereon for taxes, penalty and interest due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. By way of reply (R. 5) to respond-

ent's answer, in which respondent set up his lien, petitioner set forth the fact that the real estate now owned by him was formerly owned by The Sterling-Knight Company, which, during its ownership thereof, was declared a bankrupt, and petitioner, after further setting forth at length certain proceedings had in the bankruptcy court to marshal liens upon such real estate (R. 5), to which proceedings respondent was a party and in which he appeared (R. 6), averred that the lien of the respondent had been fully adjudicated in the Bankruptcy Court of the United States for the Northern District of Ohio, Eastern Division, and that respondent now had no lien upon the premises described in his petition for taxes for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, found and determined (R. 26) that the District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, had no jurisdiction, power or authority to adjudicate the lien of the respondent for taxes, or to transfer the lien of the respondent from the property to the fund to be derived from the sale thereof, and that notwithstanding such adjudication in the Bankruptcy Court, respondent still had a valid lien on the premises for taxes for the years 1924, 1925, 1926 and 1927. The Supreme Court of Ohio denied petitioner's motion therein filed for an order directing the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review, and likewise dismissed petitioner's petition in error therein filed as of right (R. 28).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Petitioner purchased the real estate herein involved free and clear of the lien asserted by respondent for taxes for the years 1924, 1925, 1926 and 1927 (R. 24), relying upon an order (R. 22) of a federal bankruptcy court directing the sale thereof free from such lien. This order was made in a proceeding which was then pending in the United States District Court for the Northern District of Ohio, Eastern Division, to marshal liens, in which respondent was named as a defendant (R. 20), of which he was notified as required by the federal bankruptcy act (R. 20), and in which he appeared and asserted his lien. (R. 22) The finding of the bankruptcy court (R. [illegible]) that respondent's lien was a third lien on the real estate involved, and its order that such lien be transferred from the property to the fund to be derived from the sale thereof, and that such property be sold free and clear of encumbrances, have never been modified, vacated or reversed. (R. 26) The finding and judgment of the Court of Appeals of Trumbull County, Ohio, that the federal bankruptcy court had no jurisdiction (R. 26) or power to transfer respondent's tax lien from the property to the fund to be derived from the sale thereof, or to order a sale of such property free from respondent's tax lien, place a construction upon Article 1, Section 8, paragraph 4 of the Constitution of the United States and upon the federal bankruptcy statutes which is wholly untenable. The precise question has never been before this Court, so far as counsels' research has disclosed, although the power, jurisdiction and authority of the bankruptcy court to order sales of real estate free and clear of encumbrances, including tax liens, has been up-

held by numerous decisions of the various United States Circuit Courts of Appeal and District Courts.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to a judgment and decree of a court of the United States, rendered in a cause of which the court of the United States had exclusive jurisdiction of the subject matter, in which respondent was named as a defendant, notified as required by law and in which he appeared and asserted the same lien he now asserts.

3. The finding and judgment of the Court of Appeals of Trumbull County, Ohio, cast a cloud upon the title of purchasers who heretofore have purchased property under an order of the bankruptcy court ordering the same sold free and clear of encumbrances. They act as a deterrent to the future sales of property in bankruptcy which bankruptcy courts might order to be made free and clear of encumbrances, and thus give rise to an important question of federal law which has not been but should, it is submitted, be settled by this Court.

4. The finding and judgment of the Court of Appeals of Trumbull County, Ohio, fail to protect and, in fact, deny the title, right, privilege and immunities which your petitioner claims under the constitution and statutes of the United States.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Trumbull County, Ohio, commanding that court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 613, I. J. Van Huffel,

Plaintiff v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, substituted party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio, Defendant, and that the decree and judgment of the Court of Appeals of Trumbull County, Ohio, be reversed by this Honorable Court, and that of the Common Pleas Court of Trumbull County, Ohio, in cause No. 28,887 upon its docket, entitled I. J. Van Huffel, Plaintiff, v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, substituted party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio, Defendant, be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

I. J. VAN HUFFEL,
By H. H. HOPPE,
And ALONZO M. SNYDER,
His Attorneys.

SNYDER, THOMSEN, FORD, SEAGRAVE & ROUDEBUSH,
Williamson Building, Cleveland, Ohio,

FILLIUS & FILLIUS,
2nd National Building, Warren, Ohio,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1930.

No. .....

I. J. VAN HUFFEL,

Petitioner,

v.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, Successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio.

Respondent.

BRIEF OF PETITIONER

In Support of Petition for Writ of Certiorari.

I.

THE OPINIONS OF THE COURTS BELOW.

The written opinion of the Court of Appeals of Trumbull County, Ohio, is not reported, but is set forth at length in the record on page 13. No written opinions were rendered by the Supreme Court of Ohio or by the Common Pleas Court of Trumbull County, Ohio.

II.

JURISDICTION.

1. Section 344 of Title 28, U. S. C., (Judicial Code Section 237, amended) provides:

"(a) . . .

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein * * * any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *

"(c) * * *"

Section 350 of Title 28, U. S. C., provides:

"No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *."

2. This proceeding was instituted in the Common Pleas Court of Trumbull County, Ohio, on the 23rd day of March, 1929. (R. 1.) The Common Pleas Court of Trumbull County, Ohio, rendered final judgment for your petitioner on the 28th day of March, 1930. (R. 10.) Upon appeal by respondent to the Court of Appeals of Trumbull County, Ohio, judgment was entered for the respondent on the 17th day of September, 1930. (R. 19.) Within thirty days and on the 14th day of October, 1930, petitioner filed in the Supreme Court of Ohio both a petition in error (R. 27) as of right (Section 12270 of the General Code of Ohio), claiming a constitutional question to be involved, and a motion for an order requiring the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review. (Rule VIII, Section 1, 113 O. S. lxxiii.) Petitioner's petition in error filed in the Supreme Court of Ohio as of right was dismissed (R. 28), and petitioner's motion for an order directing the Court of Appeals of Trumbull County, Ohio,

to certify to the Supreme Court of Ohio its record for review was overruled (R. 28) on the 24th day of December, 1930. On the 16th day of January, 1931, and within the time limited by law therefor (Rule XX, Section 1, 113 O. S., lxxxvi), petitioner filed in the Supreme Court of Ohio an application for rehearing (R. 28), both as to his petition in error filed as of right and his motion for an order requiring the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review. This application for rehearing was denied by the Supreme Court of Ohio on the 7th day of February, 1931 (R. 29), and thereupon the judgment of the Court of Appeals of Trumbull County, Ohio, became the final judgment of the highest state court in which a judgment in this cause could be had, unless it can be said that the filing by petitioner, in the Supreme Court of Ohio, of a transcript of the record of the proceedings had in the Court of Appeals. (R. 27), which petitioner was required to do at the time of filing therein his petition in error (Section 12263 of the General Code of Ohio), resulted in the rulings of the Supreme Court of Ohio, herein above referred to, becoming the final judgment of the highest state court in which a judgment in this cause could be had.

3. The suit below was one on behalf of petitioner to quiet title to certain real estate, which he owned and of which he was in possession, against the claim of the respondent, who claimed a lien thereon for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. (R. 1) By way of reply (R. 5) to respondent's answer to petitioner's petition, in which answer respondent set up his claim (R. 3), petitioner averred that the real estate now owned by him was formerly owned by The Sterling-Knight Company, an Ohio corporation, which at the time of its ownership thereof was declared a bankrupt by the District Court of the United States for the Northern District of Ohio, Eastern Division; that one H.

B. Doyle was subsequently elected and he duly qualified as the Trustee in Bankruptcy of The Sterling-Knight Company; that as such Trustee he filed, with the District Court of the United States for the Northern District of Ohio, Eastern Division, his petition to marshal the liens upon such real estate, to determine their validity and priority, and praying for an order of sale thereof, free and clear of liens; that respondent was made a party defendant to such proceedings, was duly notified thereof as required by law and filed his answer therein, setting up his lien for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927; that the District Court of the United States for the Northern District of Ohio, Eastern Division, determined respondent's lien for taxes to be a third lien upon the real estate, and transferred the same, as well as the liens of other lienholders, from the property to the fund to be derived from the sale thereof, and directed the Trustee in Bankruptcy to sell the same at public sale, free and clear of all liens and encumbrances, including the lien of respondent; that pursuant to such order the Trustee in Bankruptcy sold said premises at public sale, free and clear of all liens including the lien of the respondent; that petitioner claims title to the premises so sold by mesne conveyances from the purchaser at such sale and pursuant to and under the terms of such decree of the District Court of the United States for the Northern District of Ohio, Eastern Division; that the order of such court is still in full force and effect, has never been vacated, modified or reversed, and that the same fully adjudicated the right of respondent, and that by reason thereof the respondent now has no right, title, interest, claim to or lien upon the premises described in petitioner's petition for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, held and determined that the

Bankruptcy Court of the United States for the Northern District of Ohio, Eastern Division, was wholly without jurisdiction, power or authority (R. 26) to transfer respondent's tax lien from the premises to the fund to be derived from the sale thereof, or to extinguish the lien of respondent and that consequently such lien was still a lien thereon, which the respondent was authorized to enforce in the manner prescribed by the statutes of the State of Ohio. (R. 26) Thus the title, right, privilege and immunity of petitioner, claimed under the constitution and statutes of the United States, set forth and pleaded in petitioner's reply to the respondent's answer, was denied by the Court of Appeals of Trumbull County, Ohio. Under the provisions of Section 344 of Title 28, U. S. C. *supra*, it is respectfully submitted that this Court has jurisdiction to review such judgment.

4. The following cases sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of Trumbull County, Ohio:

Diepasseur v. Rocherean, 21 Wall. 130;
Embry v. Palmer, 107 U. S. 3, 9;
Factors etc. Insurance Co. v. Murphy, 111 U. S. 738;
New Orleans Spanish Fort & Lake R. R. Co. v. Delamore, 114 U. S. 501;
Traer v. Clews, 115 U. S. 528;
Crescent City etc. Co. v. Butchers Union etc. Co., 120 U. S. 141;
Pendleton v. Russell, 144 U. S. 640;
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Long Island Loan & Trust Co., 172 U. S. 493;
National Foundry & Pipe Works v. Oconto City Water Supply Co., 183 U. S. 216.

In *Myers v. International Trust Co.*, 263 U. S. 64, at page 69, the late Chief Justice said:

"The case here turns on the effect of the bankruptcy record and so presents a federal question whether full faith and credit was given to the judgment of the federal court."

In *Supreme Lodge v. Meyer*, 265 U. S. 30, it was said:

"While proceedings in Federal courts are not within the terms of Article IV, Sec. 1 of the Constitution, they nevertheless must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state."

5. The court will observe that petitioner has filed two petitions for writs of certiorari. The reason for so doing is that counsel for petitioner have been unable to ascertain under the peculiar circumstances of the case as to which state court the writ of certiorari, if granted, should be directed by this Court. Upon receiving an adverse decision in the Court of Appeals of Trumbull County, Ohio, petitioner filed, in the Supreme Court of Ohio, as is common practice, both a motion for an order directing the Court of Appeals to certify thereto its record for review, and a petition in error as of right, claiming a constitutional question to be involved. (R. 27) Article IV, Section 2 of the Constitution of Ohio provides that the Supreme Court:

"* * * shall have * * * appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the court of appeals."

A certified transcript of the record of the proceedings had in the Court of Appeals of Trumbull County, Ohio, was not filed in the Supreme Court of Ohio, nor was it required to be filed, at the time petitioner filed therein his motion

for an order directing the Court of Appeals to certify thereto its record for review; though such record was filed, (R. 27) and was required to be filed, in the Supreme Court of Ohio at the time petitioner filed therein his petition in error as of right.

Section 12263 of the General Code of Ohio provides:

> "With his petition, plaintiff in error shall file either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of. * * *"

Had no petition in error been filed in the Supreme Court of Ohio, then in view of the denial by the Supreme Court of Ohio of petitioner's motion to certify, the writ of certiorari of this Court, if granted, would have to be directed to the Court of Appeals of Trumbull County, Ohio.

Second National Bank v. First National Bank, 242 U. S. 600;
American Railway Express Co. v. Levee, 263 U. S. 19;
Matthews v. Huwe, 269 U. S. 262;
Minneapolis, St. P. & S. Ste. M. R. Co. v. Rock, 279 U. S. 410.

Had no motion to certify the record been filed in the Supreme Court of Ohio, then in view of the fact that that court dismissed petitioner's petition in error upon the grounds that no debatable constitutional question was involved, quaeri whether this Court would have any jurisdiction upon writ of certiorari, the petitioner not having exhausted all of his remedies in the state courts. *Matthews v. Huwe, supra.* If this Court did have jurisdiction under such circumstances, then its writ for certiorari, if granted, would have to be directed to the Supreme Court of Ohio. *Matthews v. Huwe, supra.* In the instant case where both a motion to certify and a petition in error were filed in the

Supreme Court of Ohio, counsel for petitioner were fearful that if they requested a writ for certiorari to be granted, directed to the Supreme Court of Ohio, then, if the same were granted and in view of the fact that petitioner's petition in error filed in the Supreme Court of Ohio was dismissed upon the ground that there was no debatable constitutional question involved, the only question which counsel would be permitted to raise in this Court would be whether or not any constitutional question was involved. Counsel for petitioner do not desire to be so restricted in the questions which the record presents, but desire to raise in this Court, should their petition be granted, the questions of general law presented by the record, as well as the constitutional question. Therefore two petitions for writs of certiorari have been filed, one asking that the writ, if granted, be directed to the Supreme Court of Ohio and the other asking that the same, if granted, be directed to the Court of Appeals of Trumbull County, Ohio. At the time of filing each petition certified copies of the record were filed, one certified by the Clerk of the Supreme Court of Ohio and the other by the Clerk of the Court of Appeals of Trumbull County, Ohio.

III.

STATEMENT OF THE CASE.

Petitioner filed his action below under favor of Section 11901 of the General Code of Ohio, which provides as follows:

> "§11901. *Action to quiet title.*—An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having, or claiming to have an estate or interest in remainder or reversion in real property,

against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

In his petition filed below (R. 1) petitioner alleged that he was the owner of, and was in possession of, the real estate described in his petition, and that the respondent claimed an estate or interest therein adverse to the petitioner, and he prayed that respondent be compelled to answer, setting up his interest, or be forever barred, and that upon final hearing his title might be quieted as against any and all claims of respondent. To this petition the respondent filed an answer (R. 3) claiming certain taxes to be due him as Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926, 1927, 1928 and 1929. Taxes for the years 1928 and 1929 are not here in dispute. As to the taxes which the respondent claimed for the years 1924, 1925, 1926 and 1927, the petitioner by way of reply (R. 5) to respondent's answer, and, after averring and setting forth at length certain proceedings had in the District Court of the United States for the Northern District of Ohio; Eastern Division, sitting in bankruptcy, averred that respondent's lien for taxes for such years had been fully adjudicated in such bankruptcy proceedings, and that they now were not a lien upon petitioner's real estate, and that by reason of the proceedings had in the District Court of the United States for the Northern District of Ohio, Eastern Division, respondent had no claim, right to or lien upon such real estate for taxes for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, made a finding of fact (R. 19) separate and apart from its conclusions of law. (R. 26) The facts are not in dispute. The error herein complained of arises over the first conclusion of law made by the Court of Appeals of Trumbull County, Ohio, which is as follows:

"The Bankruptcy Court had no power or jurisdiction to relieve the real estate belonging to the bankrupt estate of The Sterling-Knight Company from the taxes which, with penalty and interest had accrued at the time the real estate was ordered to be sold, and consequently taxes due to the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927, plus penalty and interest, are still a lien upon the real estate described in plaintiff's petition, which can be collected in the manner authorized by the laws of the State of Ohio." (R. 26)

IV.

SPECIFICATIONS OF ERROR.

It is respectfully submitted that the facts as found by the Court of Appeals of Trumbull County, Ohio, do not support its judgment, in that:

1. The District Court of the United States for the Northern District of Ohio, Eastern Division, in the bankruptcy proceedings of The Sterling-Knight Company, did have the power and authority to transfer the tax lien of the respondent from the real estate of The Sterling-Knight Company to the fund to be derived from the sale thereof, and did have the power and authority to order the sale of such real estate free and clear of all encumbrances, including the tax lien of the respondent.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to the judgment and decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, in the bankruptcy proceedings of The Sterling-Knight Company, to which respondent was named as a party defendant, of which he was notified as required by law and in which he appeared and set forth the same tax lien which he now seeks to assert against the property of petitioner.

V.

UNITED STATES CONSTITUTIONAL, STATUTORY PROVISIONS AND GENERAL ORDERS INVOLVED.

Article I, Section 8, paragraph 4, of the Constitution of the United States provides:

> "The Congress shall have power * * * to establish uniform laws on the subject of bankruptcies throughout the United States."

Section 1, Title 11, U. S. C. (Section 2 of the Bankruptcy Act) provides:

> "The courts of bankruptcy * * *, namely, the district courts of the United States in the several states, * * * are hereby invested * * * with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to
>
> (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;
>
> (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;
>
> (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;
>
> (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;
>
> (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title;
>
> Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power

it would possess were certain specific powers not herein enumerated."

Section 45, Title 11, U. S. C. (Section 22 of the Bankruptcy Act) provides:

"(a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specifically with only limited authority to act in the premises or to consider and report such specified issue; * * *."

Section 53, Title 11, U. S. C. (Section 30 of the Bankruptcy Act) provides:

"All necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

General Order XII provides:

"1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; * * *. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

General Order XVIII provides:

"1. All sales shall be by public auction unless otherwise ordered by the court."

General Order XXVII provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Section 66, Title 11, U. S. C. (Section 38 of the Bankruptcy Act) provides:

> "Referees respectively are invested, subject always to a review by the judge, * * * with jurisdiction to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *."

Section 75, Title 11, U. S. C. (Section 47 of the Bankruptcy Act) provides:

> "Trustees shall * * * (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; * * *."

Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act) provides:

> "(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of * * * (4) all proposed sales of property; * * *.
>
> "(c) All notices shall be given by the referee, unless otherwise ordered by the Judge."

Section 104, Title 11, U. S. C. (Section 64 of the Bankruptcy Act) provides:

"Debts which have priority. (a) The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments, the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estate, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankruptcy in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses

of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

Section 110, Title 11, U. S. C. (Section 70 of the Bankruptcy Act) provides:

"The trustee of the estate of a bankrupt, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *."

Section 687 of Title 28, U. S. C., provides:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

ARGUMENT.

1. In a proceeding in a court of bankruptcy to sell and marshal liens, to which the Treasurer of Trumbull County, Ohio, is made a party and in which he appears and sets up his tax lien, has the court the power and jurisdiction to order the bankrupt's real estate sold free and clear of the lien of the Treasurer of Trumbull County, Ohio, for taxes due the county and state, and, by the same order, transfer such lien from the property to the fund to be derived from the sale thereof?

The finding of the Referee in Bankruptcy, (R. 8, 23), that the lien of the respondent for taxes was a third lien upon the real estate in question, might have been erroneous. The lien for taxes assessed against real estate is usually held to be the first lien thereon, and such taxes are usually ordered to be first paid out of the proceeds of any judicial sale. It was the lien of the United States filed by C. F. Routzahn, Collector of Internal Revenue, which confused the referee. The latter lien was one for manufacturer's excise tax (R. 22) which was not filed for record with the Recorder of Trumbull County until August 10, 1925 (R. 22), long after the mortgagees had procured their mortgage lien. (R. 22) Section 115, Title 26, U. S. C., provides:

> "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property * * *.
>
> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> "(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; * * *."

Under this Section of the Code the lien of C. F. Routzahn, Collector of Internal Revenue, was admittedly a third lien, being subsequent to the mortgage liens of The Union Trust

Company, Trustee, and The Old Dominion Mortgage Company. Section 104, Title 11, U. S. C., (page 20 *supra*) (Section 64 of the Bankruptcy Act), provides that taxes due the United States, state, county, district or municipality are of equal priority and the referee could not see how, in view of this provision of the Bankruptcy Act, he could give the Treasurer of Trumbull County a first lien and C. F. Routzahn a third lien. So he found that all taxes were a third lien. Perhaps he had in mind that there were general funds from which the taxes might have been paid, if proper application therefor had been made. But the fact that the referee's finding might have been erroneous does not warrant the conclusion that the bankruptcy court was without power or jurisdiction to make the order it did make.

In *Lessee of Paine v. Mooreland*, 15 O. 435 at 445, it is said:

> "A court, then, may act, first, without power or jurisdiction, second, having power or jurisdiction, may exercise it wrongfully; or, third, irregularly. In the first instance, the act or judgment of the Court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power."

It is the position of counsel for petitioner that at most the bankruptcy court acted erroneously and, its error not having been corrected by proper error proceedings, its finding is now final and conclusive. It was simply an *erroneous* decision.

The claim of the respondent is based upon Section 5671 of the General Code of Ohio, which provides as follows:

> "§5671. *When lien of state for taxes attaches.*— The lien of the state for taxes levied for all purposes,

in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *"

This Section of the General Code of Ohio can have no bearing upon the question here presented for the power and jurisdiction of the bankruptcy court is derived from and defined by the acts of Congress and not the legislative enactments of Ohio or of any other state.

It must be admitted that by virtue of Article I, Section 8, paragraph 4 of the United States Constitution, (page 17 *supra*) which authorizes Congress to establish an uniform bankruptcy law, the bankruptcy laws enacted pursuant thereto are paramount to any state laws upon the same subject, and that when the *state laws* in any wise *conflict* with the bankruptcy laws, the latter prevail. *International Shoe Company v. Pinkus*, 278 U. S. 261. *In re Moore*, 42 F. (2nd) 475.

The bankruptcy act enacted pursuant to this provision of the Constitution authorizes the bankruptcy court to refer the administration of bankrupt estates to referees, either generally or for some specific purpose. Section 45, Title 11, U. S. C. (page 18 *supra*) (Section 22 of the Bankruptcy Act). General Order in Bankruptcy XII, (page 18 *supra*) promulgated by the Supreme Court of the United States, pursuant to Section 53, Title 11, U. S. C. (page 18 *supra*) (Section 30 of the Bankruptcy Act), provides that when a case is referred to the referee

"all proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

Section 66, Title 11, U. S. C. (Section 38 of the Bankruptcy Act) provides:

"Referees respectively are invested, subject always to a review by the judge, * * * with jurisdiction

to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *."

There is no requirement in the bankruptcy act or in the general orders that sales of the bankrupt's property can be ordered only by the judge, and consequently, in view of the finding by the Court of Appeals that the bankrupt estate here under consideration was referred (R. 19) to the referee for administration, he had the authority, if any one had it, to order the sale in question and to marshal liens.

There is nothing to be found in the Bankruptcy Act, which expressly authorizes the court to sell the property of the bankrupt free and clear of all liens or of any specific lien, or which requires the court to sell the property of the bankrupt subject to all liens or to any specific lien. But inasmuch as Section 1, Title 11, U. S. C. (page 17 *supra*) (Section 2 of the Bankruptcy Act) invests bankruptcy courts with such jurisdiction at law *or in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings, to

"(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

* "(6) *bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;* (Italics ours.)

"(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title."

and further, inasmuch as Section 75, Title 11, U. S. C. (page 19 *supra*) (Section 47 of the Bankruptcy Act) requires trustees in bankruptcy to collect and reduce to money the property of the bankrupt, it has been held times without number that a bankruptcy court can sell the property of the bankrupt free and clear of all liens, or subject to liens, or free from some liens and subject to others, transferring the liens from the property to the fund to be derived from the sale thereof.

People's Homestead Association v. Bartlette, 33 F. 2d. 561 (C. C. A. 5th Circuit);

In re Danville Hotel Co., 33 F. 2d. 162 (District Court, Illinois);

In re Gish, 32 F. 2d. 322 (District Court, Kentucky);

In re Macklem, 28 F. 2d. 417 (District Court, Maryland);

In re Southern Florida Realty Corporation, 16 F. 2d. 171 (District Court, Florida);

In re Gimbel, 294 Fed. 883 (C. C. A. 5th Circuit);

Gantt v. Jones, 272 Fed. 117 (C. C. A. 4th Circuit);

In re Franklin Brewing Co., 249 Fed. 333 (C. C. A. 2nd Circuit);

In re Reading Hat Mfg. Co., 224 Fed. 786 (District Court, Pennsylvania);

In re National Boat & Engine Co., 216 Fed. 208 (District Court, Maine);

Cf. Whitney v. Wenman, 198 U. S. 539;

Murphey v. Hofman Co., 211 U. S. 562.

In *Gantt v. Jones*, 272 Fed. 117, the court said:

"1. The power of a bankruptcy court to order a sale of the bankrupt's property free from liens is not expressly conferred but is necessarily implied, as such sale is often necessary to the due execution of the power and duty to reduce the assets to money and distribute it to creditors.

In *In re National Boat & Engine Company*, 216 Fed. 208, the court said:

"1. Under the broad powers conferred by Bankruptcy Act July 1, 1898, c. 541, Section 2 (7) 30 Stat. 546, (U. S. Comp. st. 1901, p. 3421) to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, when property has thus become subject to a court of bankruptcy, jurisdiction exists to pass on questions relating to its disposition and to determine the extent and character of liens thereon and rights therein, and to that end to bring in and substitute additional parties whenever necessary for a complete determination of the matter in controversy.

"2. As a consequence of the power of a court of bankruptcy to order the sale of property of a bankrupt free of liens, it has jurisdiction to determine the validity, extent and relative priority of liens on the proceeds which stand as a substitute for the property sold, and in proceedings for the distribution of such fund, the trustee should appear and protect the rights of the estate."

And such power can be exercised even though the lien claimant objects. *In re Gimbel, supra; In re Franklin Brewing Co., supra.*

In *In re Loveland*, 155 Fed. 838 (C. C. A. 1st Circuit), it was held that the order of sale could be issued without first determining the amount or the validity of the liens.

True it is that the bankrupt estate acquires no greater title than the bankrupt itself had and that it takes title

subject to all such liens and encumbrances as are not avoided by the bankruptcy laws, but the property having passed into the hands of a court of bankruptcy the *remedy* of lien claimants is alone affected. As was said by the court in *In re Reading Hat Mfg. Co.*, 224 Fed. 786:

> "A trustee in bankruptcy succeeds by operation of law to the title of the bankrupt; but liens and incumbrances, not avoided by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544), remain unaffected, except so far as the remedy of enforcement is limited by the property having passed into the custody of the court."

By reason of the provisions of Section 94, Title 11, U. S. C. (page 19 *supra*) (Section 58 of the Bankruptcy Act), creditors are entitled to at least ten days' notice by mail of all proposed sales of property. By reason of the finding of fact of the Court of Appeals with respect to the notices given in the instant case (R. 20), the validity of the order of the bankruptcy court cannot be questioned upon that ground.

In all of the cases above cited, in which property was ordered sold free and clear of encumbrances, the particular question here involved, to-wit, whether such order can be made as against the lien of a state for taxes was not passed upon or decided. It would seem, however, that inasmuch as a bankruptcy court must of necessity be authorized to sell property free and clear of *all* encumbrances, when the sale of the property in that form will, in the opinion of the bankruptcy court, be of greater benefit to the bankrupt's estate than such sale would be if made subject to encumbrances, there is no reason, either at law or in equity, why that doctrine should alone apply to lien claimants other than the Government, state or county. Certainly they are each as necessary a party as any other lien claimant to a complete determination of the question of the

legality, amount and priority of the liens upon the bankrupt's property, a question which the bankruptcy court must determine in order to know whether such property should be abandoned, because there is no equity therein for the general creditors, or whether the bankruptcy court should exercise the jurisdiction that it has over such property and dispose of it, either subject to encumbrances or free from encumbrances.

In *The Dollar Savings Bank v. United States*, 19 Wall. 233, at 239, the court said:

> "It is a familiar principle that the King is not bound by any Act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. *Magdalen College* case, 11 Coke, 74; *King v. Allen*, 15 East, 333. He may even take the benefit of any particular Act, though not named. Case of a *Fine Levied, etc.*, 7 Coke, 32; *Pott. Dwarris*, 151, 152. The rule thus settled respecting the British crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal Courts. It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *parens partiae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution."

See also

United States v. Herron, 20 Wall. 253;
Lewis v. United States, 92 U. S. 618.

The doctrine of the above cases was recognized in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, wherein the United States was held subject to the bankruptcy act because named therein. The court said on pages 159 and 160:

"It will be seen, therefore, that by the statute of 1797 (now §3466) and §5101 of the Revised Statutes, all debts due to the United States were expressly given priority to the wages due any operative clerk, or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality.' These were civil obligations, not personal conventions, and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. *The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment.* The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants." (Italics ours)

In *In re General Film Corporation*, 274 Fed. 903 (C. C. A. 2nd Circuit) in which the question of income taxes due to the federal government was involved, the court said at page 904:

"The government's first proposition is that the only remedy open to the trustee for correcting any error is to pay the taxes and then proceed under Rev. Stat. 3226 (Comp. St. 5949) by appeal to the Commissioner of Internal Revenue and, if the Commissioner delay decision for more than six months, to bring suit. But Congress in the Bankruptcy Act of 1898 (Comp. St. §§9585-9656) has departed very considerably from the principles of public policy theretofore prevailing as to the rights of the sovereign. The Supreme Court pointed this out in *Guarantee Title & Trust Co. v. Title*

Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706.

"Section 64a of the Bankruptcy Act reads:

"'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.' Comp. St. §9648.

"We regard this section as binding upon the government because it is named therein and, while conferring priority, as giving the bankruptcy court the power to hear and determine any question that arises as to the amount or legality of a tax assessed by it. The provision applied *to taxes of all the persons mentioned*, and we could not differentiate the government from the other persons in the absence of language justifying it." (Italics ours)

In *In re Anderson*, 279 Fed. 525 (C. C. A. 2nd Circuit), in which the trustee in bankruptcy served a motion and a petition upon the Collector of Internal Revenue for the Second District of New York, returnable before the referee, wherein the trustee prayed for an order barring and foreclosing the United States from participating in the bankrupt's estate, or in the alternative be directed to file its claim or claims on or before a day certain in order that a hearing thereon might be had in accordance with law, the United States appeared specially and moved to dismiss the trustee's petition upon the grounds that the bankruptcy Court was without jurisdiction and that service upon the Collector of Internal Revenue was not service upon the United States. These

objections were overruled, the hearing was had and the referee barred the United States from participating in the bankrupt estate, which order was affirmed upon review by the District Court. From such affirmance by the District Court the United States filed its petition to review in the United States Circuit Court of Appeals. The court said on page 529:

> "The United States must file its claim for taxes, as any other creditor, if it desires to share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546.
>
> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. * * * The court granted 10 days after the service of a copy of the order within which to move to dispute the merits of the finding of the referee below.

This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

In *In re Brezin*, 297 Fed. 300 (District Court, New Jersey), the court recognized the validity of the doctrine announced in the *Anderson* case, *supra*, but held that, because the United States was not specifically mentioned in that section of the Bankruptcy Act which provides that claims could not be proved subsequent to one year after the adjudication, the United States had the right to prove its claim after the year had expired. The doctrine in the *Anderson* case, *supra*, was likewise recognized in the cases of *United States v. Wood*, 290 Fed. 109 (C. C. A. 2nd Circuit); *In re Sheinman*, 14 F. 2nd 323 (District Court of Pennsylvania); *United States v. Bernstein*, 16 F. 2nd 233 (C. C. A. 8th Circuit). See also *Nisbett v. Trust Company*, 229 Fed. 644, 649 (C. C. A. 8th Circuit).

What is true of the sovereign United States must likewise be true of the sovereign States, for Section 104, Title 11, U. S. C. (pages 20, 21, *supra*) (Section 64 of the Bankruptcy Act) provides:

"The term 'person' as used in this Section shall include corporations, the United States and the several States and Territories of the United States * * *"

and indeed it has been so held.

In *In re Florence Commercial Co.*, 19 Fed. 2d. 468, (C. C. A. 9th Circuit), certiorari denied 275 U. S. 542, the Treasurer of Pinal County, Arizona, acting under the statutes of that state, seized a stock of merchandise of the Florence Commercial Company to enforce the payment of tax claims for the years 1921 to 1926, aggregating $9,139.34.

Five days later the Florence Commercial Company was adjudged a bankrupt and thereafter the trustee in bankruptcy filed an application with the court for a show cause order to be served upon the County Treasurer of Pinal County, Arizona, to the end that upon a hearing the validity and amount of the tax claims might be determined and the trustee in bankruptcy authorized to sell the property free and clear of liens. In reply to the show cause order the Treasurer of Pinal County, Arizona, filed a special answer in the nature of a plea to the jurisdiction of the bankruptcy court. The court, with respect to Section 104, Title 11, U. S. C., (Section 64 of the Bankruptcy Act), said, 19 Fed. 2d. 469:

> "It is not controverted that the 'court' here referred to is the bankruptcy court, and that the hearing and determination provided for are to be had, not in a plenary suit, but in a summary proceeding such as we are considering. That Congress has the power to confer the requisite jurisdiction upon the bankruptcy court is not open to doubt. *In re Wood*, 210 U. S. 246, 28 S. Ct. 621, 52 L. Ed. 1046. Has it exercised that power? In effect, if not in terms, appellants argue that the section ceases to be operative or is inapplicable where, as here, the tax-collecting agency, in proceedings to force payment, acquires possession of the taxed property prior to bankruptcy. But this view cannot be taken without reading into the general language an unexpressed exception, inconsistent with both its letter and its spirit."

In *In re Stavin*, 12 F. 2d, 471 (District Court, New York), certain wage creditors who were entitled to priority of payment were seeking to obtain the payment of their claims upon the grounds that there was sufficient money to pay their claims in full. The referee, before ordering such claims paid, desired to ascertain the amount of *taxes due to the State of New York and to the United*

States. For this purpose the referee, within five months from the date of adjudication, served upon the State of New York and the United States Government an order requiring them to file, within sixty days after the service of such order, any and all claims which they had against the bankrupt's estate. The trustee in bankruptcy thought this order was erroneous in that the year within which creditors could prove their claims had not as yet expired, with the result that the referee in bankruptcy certified the question to the District Court for review. It might be added that neither the State of New York nor the United States put in any appearance in response to the show cause order. The District Court in passing upon the question so certified to it said:

"Under section 64a of the Bankruptcy Act (Comp. St. §9648), the bankruptcy court is required to pass upon and determine the amount and the validity of taxes claimed to be owing by the bankrupt to the state and to the United States. *In re General Film Corporation* (C. C. A.) 274 F. 903; *In re [illegible]erson* (C. C. A.) 279 F. 525; *In re Brezin* (D. C.) 297 [illegible]00; *In re Wyley Co.* (D. C.) 292 F. 900. Inasmuch as this section expressly provides that the court shall order the trustee to pay such taxes 'in advance of the payment of dividends to creditors,' the intention is clear that all sums due for taxes should be promptly ascertained and determined before the first dividend is declared.

"Section 65b (Comp. St. §9649) contemplates payment of a first dividend within 30 days after the adjudication, provided the estate is in funds sufficient to pay priority debts and a dividend of 5 per cent. But under section 64a taxes legally due and owing by the bankrupt must first be determined and ordered paid. For this purpose the bankruptcy court may by proper *notice bring the state and the United States before it,* to the end that claims for all taxes legally due and owing may be ascertained and their validity deter-

mined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper, and clearly within the jurisdiction of the court in the exercise of its power under section 64a. * * *"

In *In re Prince & Walter*, 131 Fed. 546, (District Court, Pennsylvania), in which was involved the question of the proper distribution of funds derived from the sale of the bankrupt's real estate, the court said, at page 549:

"But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. *In re Veitch*, 4 Am. Bankr. Rep. 112, 101 Fed. 251. *In re Brinker* (D. C.) 128 Fed. 634; *City of Waco v. Bryan* (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, *J.*). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. *In re Keet*, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed."

Counsel for respondent no doubt will contend, as they contended below, that the only jurisdiction of the Bankruptcy Court under Section 104, Title 11, U. S. C., (Section 64 of the Bankruptcy Act), is to determine the amount or legality of the taxes, in case any question as to the amount or legality thereof arises, and that in the case at bar no question arose before the Bankruptcy Court as to the amount or legality of respondent's tax claim. The record does not disclose whether or not the legality or amount of respondent's tax claim was in any wise contested, but certainly the provisions of the Bankruptcy Act are not to be given such narrow construction, for under Paragraph (b) of the Section, the Bankruptcy Court must determine the priority of tax claims, as well as determine their amount and legality under Paragraph (a). As was said by the Court in *In re Florence Commercial Co.*, 19 Fed. 2d. 468, at 470, certiorari denied 275 U. S. 542:

> "Nor are we inclined to the narrow view that, while there may be jurisdiction to determine the amount of the tax, it does not extend to the incidental matter of the tax lien. The bankruptcy court is to see to it that the estate fully discharges all legal obligations in respect of taxes; and accordingly it is invested with power to decide all questions incidental to the performance of that duty."

It is respectfully submitted that the above authorities clearly establish the jurisdiction of bankruptcy courts to determine the priority of tax liens upon the bankrupt's real estate and to order such real estate sold free and clear thereof, transferring the liens from the property to the fund to be derived from the sale thereof, and that the Court of Appeals of Trumbull County, Ohio, erred in finding and holding that the Bankruptcy Court had no such jurisdiction. It was in the performance of this jurisdic-

tion, that the Bankruptcy Court, in the bankruptcy proceedings of The Sterling-Knight Company, probably committed error in finding that respondent's tax lien was the third lien upon the real estate of the bankrupt, and on the funds to be derived from the sale thereof. To correct this error the law provided the respondent with a remedy. Under Section 66, Title 11, U. S. C. (page 19, *supra*) (Section 38 of the Bankruptcy Act), and under General Order in Bankruptcy No. XXVII (page 18, *supra*) the respondent could have obtained a review of the rulings of the referee. He failed to take advantage of such remedy, and, it is submitted, he is now bound by the judgment of the Bankruptcy Court.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to the judgment and decree of the District Court of the United States.

The District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, having had jurisdiction, power and authority to make the order which it did make, it was the duty of the Court of Appeals of Trumbull County, Ohio, under Section 687, Title 28, U. S. C. (page 21, *supra*) to give full faith and credit thereto. *Supreme Lodge v. Meyer*, 265 U. S. 30.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the judgment and finding of the Court of Appeals of Trumbull County, Ohio, may be reversed and the right, title, privilege and immunities claimed by petitioner under the statutes of the United States may be protected, and that to such an end a writ

of certiorari should be granted and this Court should review the decision of the Court of Appeals of Trumbull County, Ohio, and finally reverse it.

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In the Supreme Court of the United States

OCTOBER TERM 1931.

No. 54.

I. J. VAN HUFFEL,

Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TRUMBULL COUNTY, OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF PETITIONER.

I—WHICH WRIT WAS PROPERLY GRANTED.

Counsel assume that the first question which this Court will desire to dispose of is as to which writ was properly granted, the one directed to the Court of Appeals of Trumbull County, Ohio, being cause No. 54, or the one directed to the Supreme Court of Ohio, being cause No. 55. Two petitions for writs of certiorari were filed (a) because counsel for petitioner were not certain as to which of the state courts this Court would hold to be possessed of the record, and (b) because, if they asked for a writ directed to the Supreme Court of Ohio, they were fearful that, if such writ were granted, they would be restricted in their argument to the question as to whether or not a constitutional question was involved, such being the only question passed upon by the Supreme Court of Ohio.

(a) Which State Court is Possessed of the Record?

The record of the proceedings had in the Court of Appeals consists of all the original pleadings and papers which had been filed in this cause, together with a transcript of docket and journal entries and the certificate of the Clerk.

Upon receiving an adverse decision in the Court of Appeals the petitioner filed in the Supreme Court of Ohio both a petition in error as of right, claiming a constitutional question to be involved, and a motion requesting the Supreme Court of Ohio to direct the Court of Appeals to certify thereto its record for review. (R. 27) Article IV, Section 2 of the Constitution of Ohio provides that the Supreme Court

> "• • • shall have • • • appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, • • •. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the court of appeals."

When filing a mtion to certify the record, one is not required to file therewith the record of the proceedings had in the Court of Appeals. Upon filing a petition in error, however, one must file therewith the record of the proceedings had in the Court of Appeals. Section 11263 of the General Code of Ohio provides:

> "With his petition plaintiff in error shall file either a transcript of the final record or a transcript of the docket and journal entries with such original papers or transcripts thereof as are necessary to exhibit the error complained of. • • •"

In the case at bar, petitioner, upon filing his petition in error in the Supreme Court of Ohio, filed therewith the

record of the proceedings had in the Court of Appeals. (R. 27). Petitioner, being then advised that respondent would file a motion to dismiss the petition in error upon the ground that no constitutional question was involved, filed a stipulation, as is common practice, to postpone the printing of the record until such motion was disposed of. (R. 28, and see Rule IV, 122 O. S. lxvii.) The Supreme Court of Ohio denied petitioner's motion for an order certifying the record and sustained respondent's motion to dismiss the petition in error filed as of right, holding that no debatable constitutional question was involved. (R. 28, 29) The record of the proceedings had in the Court of Appeals was then returned to the Clerk of the Court of Appeals in accordance with Rule IX of the Supreme Court of Ohio which provides as follows (122 O. S. lxxii):

> "After the decision of a cause in the Supreme Court, in which a final record is not required to be made in that Court, the original papers shall be returned to the Clerk of the proper Court; when so returned, the Clerk of the Supreme Court shall seal them up and direct them to the Clerk of such Court, and forward them as said Clerk may in writing direct. If not so directed within a reasonable time, they may be sent by express."

The record and original papers having been returned to the Court of Appeals and no copy thereof having been retained by the Supreme Court of Ohio, it seems to follow that the writ of certiorari granted by this Court in cause No. 54 was properly directed to the Court of Appeals of Trumbull County, Ohio, and that the writ granted in cause No. 55 directed to the Supreme Court of Ohio was improperly granted.

Hodges et al. v. Snyder, 261 U. S. 600, 601;
Sheehan Co. v. Shuler, 265 U. S. 372, 375.

This conclusion, however, seems contrary to the opinion of this Court in *Matthews v. Huwe*, 269 U. S. 262. In that

case Matthews sought to enjoin the levy and collection of certain special assessments upon the ground, among others, that the same were assessed in violation of the federal and state constitutions. A petition in error filed as of right in the Supreme Court of Ohio was dismissed, as in the case at bar, because no debatable constitutional question was involved. A writ of error directed to the Court of Appeals of Hamilton County, Ohio, was granted by this Court. Upon motion to dismiss it was held that the writ was improperly granted, first, because the petitioner had not exhausted his remedies in the state courts, in that he did not file in the Supreme Court of Ohio a motion to require the Court of Appeals to certify thereto its record for review, and second, because it appeared that the Supreme Court of Ohio had passed upon the merits of the controversy in holding that the constitutional question, the only federal question involved, was not debatable, and that consequently the writ of error granted should have been directed to the Supreme Court of Ohio. The *Huwe* case is distinguishable from the case at bar in that the only federal question there presented was a constitutional one, and the dismissal of the petition in error by the Supreme Court of Ohio, upon the ground that the constitutional question was not debatable, was not merely a dismissal for lack of jurisdiction but was likewise a dismissal upon the merits. In the case at bar the alleged constitutional question, to-wit, that the Court of Appeals failed to give full faith and credit to a judgment of the court of bankruptcy, was not determinative of the merits of the controversy or the main federal question presented, which is, "does a court of bankruptcy have the power and authority to sell the real estate of a bankrupt free and clear of a tax lien claimed by the State of Ohio and County of Trumbull?"—a question which was not passed upon by the Supreme Court of Ohio. Again, in the *Huwe* case it does not appear that the record was returned to the Court of Appeals.

Counsel are of the opinion that, inasmuch as the dismissal of petitioner's petition in error by the Supreme Court of Ohio upon the ground that no debatable constitutional question was involved was not determinative of the main federal question herein presented, and inasmuch as the record was returned by the Supreme Court of Ohio to the Court of Appeals of Trumbull County, Ohio, the writ of certiorari granted by this Court in cause No. 54 to the Court of Appeals of Trumbull County was the writ which was properly granted.

Turnpike Co. v. Virginia, 225 U. S. 264, 269;
Hodges et al. v. Snyder, 261 U. S. 600, 601;
Sheehan v. Shuler, 265 U. S. 372, 375.

(b) This Court is not Restricted to the Constitutional Question Passed on by the Supreme Court of Ohio.

Should this Court determine that the writ of certiorari directed to the Supreme Court of Ohio was the writ which was properly granted, then it is submitted that this Court, in its review, is not restricted to the constitutional question raised by petitioner's petition in error filed in such court, because the real federal question involved, to-wit, the jurisdiction, power and authority of the bankruptcy court under the Acts of Congress to sell a bankrupt's real estate free from the lien of state taxes, appears in the record of the proceedings had in the state trial court and was the main question there presented.

Silver v. Silver, 280 U. S. 117, 122;
Saltonstall v. Saltonstall, 276 U. S. 260.

II—JUDGMENT OF BANKRUPTCY COURT WAS NOT VOID.

Respondent, in his brief in opposition to the petition for a writ of certiorari herein filed, contends that the judgment of the bankruptcy court was void, and that he therefore has the right to attack the same collaterally, as he is

here doing. His right to do so, if the judgment is void, is not denied. Respondent's theory is that Section 104 of Title 11, U. S. C. (Section 64 of the Bankruptcy Act), gives a bankruptcy court the right merely to determine the legality and amount of taxes, and to order the same paid, and that when it inquires into the question of taxes for any other purpose it is exercising a jurisdiction not conferred upon it by the Bankruptcy Act. Certainly a bankruptcy court cannot order taxes paid until it has in some manner liquidated the estate and converted its assets into money. Section 1, Title 11, U. S. C. (Section 2 of the Bankruptcy Act), grants to bankruptcy courts such jurisdiction at law or in equity as it necessary to reduce bankrupt estates to money and distribute the same to those rightfully entitled thereto. In so doing the bankruptcy court must choose the method of liquidation; that is, it must determine whether it will be advantageous to the estate to administer certain property or abandon it, to sell certain property free from liens, transferring the liens to the fund to be derived from the sale thereof, or sell the same subject to liens. This right of the bankruptcy court has been held to be exclusive.

In *Isaacs v. Hobbs Tie & Timber Company*, 282 U. S. ...., 51 S. C. Rep. 270, 75 L. Ed. 332, decided February 24, 1931, the Hobbs Tie & Timber Company filed suit in a state court of Arkansas to foreclose a mortgage upon the property of one who had previously been declared to be a bankrupt by the District Court of the United States for the Northern District of Texas. The trustee in bankruptcy was named as a party defendant, and caused the case to be removed from the state court to the United States District Court for the Western District of Arkansas, where he filed an answer and in substance set up that the District Court for the Western District of Arkansas was without jurisdiction because of the bankruptcy proceedings,

alleging that the District Court for the Northern District of Texas, being the court which had declared the bankrupt a bankrupt, had exclusive jurisdiction. The District Court for the Western District of Arkansas entered a decree of foreclosure and sale providing that any surplus of the purchase money over and above the amount due the Hobbs Tie & Timber Company, plus costs, should be paid to the trustee in bankruptcy. In reversing the judgment of the District Court this Court said:

> "Thus, while valid liens existing at the time of the commencement of the bankruptcy proceedings are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to *decree their method of liquidation.*" (Italics ours.)

In *Straton v. New*, 282 U. S. ...., 51 S. C. Rep. 465, 75 L. Ed. 617, decided April 20, 1931, the bankruptcy court enjoined certain commissioners appointed by the state court of West Virginia from proceeding with the sale of certain real estate of the bankrupt to enforce liens thereon which had been acquired in the state court more than four months prior to the institution of bankruptcy proceedings. In speaking of the jurisdiction of the bankruptcy court this Court said:

> "It may inquire into the validity of liens, *marshal them and control their enforcement and liquidation.*" (Italics ours.)

In the exercise of this exclusive jurisdiction, and in marshalling liens, the bankruptcy court must of necessity determine the priority of the respective lien claimants, including the taxing authorities of both federal and state governments. Thus in *In re Alamac Operating Corporation*, 42 F. 2d 120 (C. C. A. 2d Circuit 1930), the bankruptcy court denied the claim of the State of New York for priority on account of a license tax under Section 104(b)(6) and awarded priority under Section 104(b)(7). In

In re Monroe Lumber & Supply Company, 36 F. 2d 1003 (D. C. M. D. Pa. 1929), corporation loan taxes due the Commonwealth of Pennsylvania, which had been settled and approved prior to the adjudication in bankruptcy, were given a priority in payment, while those taxes which had not been settled and approved until after adjudication were denied priority in payment. In *City of Chelsea v. Dolan*, 24 F. 2d 522 (C. C. A. 1st Circuit 1928), certiorari denied 277 U. S. 606, taxes due the City of Chelsea were denied priority over wage claims, though the bankruptcy proceedings had been instituted prior to the 1926 amendment to Section 104, no order of distribution having been made until subsequent to the time that the 1926 amendment took effect.

In *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205 (1912), a surety for a bankrupt public contractor filed a suit in equity in the Circuit Court seeking an adjudication of certain claims against the bankrupt and a determination of their priority. Mr. Justice Van De Vanter said, page 218:

> "These matters are rightly subjects for proceedings in bankruptcy, and therefore fall within the *exclusive jurisdiction of the court of bankruptcy*. A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks." (Italics ours.)

See also *Supply Co. v. Dattle*, 44 F. 2d 159 (C. C. A. 3rd Circuit 1930).

In exercising this jurisdiction, decreeing the method of liquidation and determining the priority of lien claimants, errors are bound to occur. But this fact detracts not one iota from the jurisdiction, power and authority of the bankruptcy courts. To correct such errors the bankruptcy law affords a remedy, to-wit, the filing of a petition to review the findings of the referee. A case substantially on all fours with the present case is that of *In re De Angeles*, 36 F. 2d 218 (C. C. A. 10th Circuit 1929). In this case the Treasurer of Carbon County, Utah, filed with the referee in bankruptcy an unverified statement of taxes due from the bankrupt. The trustee, believing that the County had no claim for such taxes, reported his opinion to the referee, who sent notices to the creditors, including the Treasurer of Carbon County, in which he stated that a meeting would be held on September 27, 1926, to consider the matter of taxes claimed by Carbon County. No one representing Carbon County appeared at the meeting on September 27, 1926, and the referee entered an order disallowing its claim for taxes. On March 24, 1928, a petition to review was filed by Carbon County, setting forth that it had not been represented at the meeting of September 27, 1926, and had not been advised of the disallowance of its claim for taxes until March 20, 1928. The District Court dismissed the petition to review upon the ground that it had not been filed within a reasonable time. In affirming this order of dismissal the Circuit Court said:

> "The referee has authority, however, to examine tax claims and to pass upon their validity and amount. • • • Hence, the notice of September 2, 1926, that the referee proposed to consider taxes claimed by Carbon County was notice to the County that the referee proposed, under Section 64(a), to inquire into the validity and amount of the taxes claimed. It is true that the County alleges it had no notice of any objection to its

claim to taxes. It may have been entitled to reasonable notice of the objections urged, prior to the hearing, but the failure to serve notice of such objections was no excuse for Carbon County's failure to appear at the hearing. Its failure to ascertain the result of the hearing on its tax claim was due to its own neglect and affords no ground for its delay, for a period of more than fifteen months, to take any steps to secure a review of the referee's decision."

In *Fierman v. Seward National Bank*, 37 F. 2d 11 (C. C. A. 2d Circuit 1930), the court said, on page 13:

"It is elementary that the Pennsylvania bankruptcy court had jurisdiction to collect and distribute the estate of the Pennsylvania bankrupt, the Hardwood Company. When the bankrupt's property was sold free of liens, the liens upon the property became rights against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was. See *In re Rochford*, 124 F. 182 (C. C. A. 8); *In re Kohl-Hepp Brick Co.*, 176 F. 340 (C. C. A. 2); *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327. Hence the bank, claiming ownership of the bonds, very properly intervened in the Pennsylvania proceedings, at first to prevent the destruction of its lien by the proposed sale, and later to reach the substituted fund. Indeed, no other course was open to it, if it wished to realize anything upon its collateral security."

To the same effect see *Delahunt v. Oklahoma County*, 226 F. 31 (C. C. A. 8th Circuit 1915), wherein a parcel of real estate was sold for less than taxes which, by state statutes, were a permanent lien thereon.

The court of bankruptcy, being thus vested with exclusive jurisdiction to determine the method to be pursued in liquidating the bankrupt's estate, in marshalling liens thereon and determining the priority of the respective lien claimants, including the taxing authorities of both federal and state governments, had the right in the instant case

to order a sale of the real estate of The Sterling-Knight Company, free and clear of liens, including the tax lien claimed by respondent as Treasurer of Trumbull County, Ohio. Such order was but the adoption of one of the many methods of reducing the bankrupt's estate to cash and, under the authorities above, can not in any wise be said to be void or lacking in authority under the Bankruptcy Act.

Respondent further contends that the bankruptcy court was without jurisdiction to transfer his lien for taxes from the property to the fund to be derived from the sale thereof because of the provisions of Section 5671 of the General Code of Ohio, which provides as follows:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *"

By virtue of this statute respondent says that all taxes are a permanent lien upon the real estate against which they are assessed, which lien is perpetual and can be removed only by payment in full or by one of the methods prescribed by the Sovereign State of Ohio. This is tantamount to saying that the state can deny to a federal court of bankruptcy a jurisdiction conferred upon such court by the federal bankruptcy act. Such position cannot, it is submitted, be maintained. *International Shoe Co. v. Pinkus*, 278 U. S. 261; *New Jersey v. Anderson*, 203 U. S. 484. In *Mason v. United States*, 260 U. S. 545, (1923), Mr. Justice Sutherland said:

> "Subject to certain exceptions, the statutes of a state are binding upon the Federal courts sitting within the state, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 44 Sup. Ct. Rep. 75. That juris-

diction is conferred by the Constitution and laws of the United States and must be the same in all the states. *Neves v. Scott*, 13 How. 268, 14 L. ed. 140."

When a court of bankruptcy takes possession of the bankrupt's property, which it most certainly has the jurisdiction to do, such property is withdrawn not only from the jurisdiction of all other courts, federal and state, but it is likewise withdrawn from the jurisdiction of any and all other executive or administrative officers of the federal and state governments. Thus in the case of *Dayton v. Standard*, 241 U. S. 588 (1916), wherein state authorities sold certain real estate for taxes notwithstanding the pendency of bankruptcy proceedings, and the question arose as to the validity of the title of the purchasers, Mr. Justice Van De Vanter said, on page 589:

> "This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon. Thus far there is no room to complain."

In *Ex parte Tyler*, 149 U. S. 164, wherein a state officer levied a tax warrant upon property in the hands of a receiver of the federal court, the court said:

> "The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated

upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

In *Mercantile Trust Co. v. Tennessee Central R. Co.*, 294 F. 483 (C. C. A. 6th Circuit, 1923), the court said, on page 488:

"It is further claimed on behalf of the petitioner that, even if the decree of sale did not so provide, the Tennessee statute in reference to the payment of taxes whenever real estate is sold under decree of court establishes a rule of property obligatory upon the federal courts. This statute (Acts Tenn. 1871, c. 68, p. 59) is directed specifically to sales of real estate 'under a decree of any court in the state' and imposes duties upon the judge of the state court that the Legislature of a state cannot impose upon federal judges. *Railway Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; *Dodge v. Tulleys*, 144 U. S. 451, 457, 12 Sup. Ct. 728, 36 L. Ed. 501; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Bein v. Heath*, 53 U. S. (12 How.) 168, 13 L. Ed. 939.

"The federal courts are vested with full equitable jurisdiction and discretion to fix the terms of sale and impose conditions in the decree confirming the sale, and this equitable jurisdiction must be exercised uniformly throughout the United States. This equitable jurisdiction can not be limited or controlled by a state Legislature. *Gamewell Fire Alarm Tel. Co. v. City of New York* (C. C.) 31 Fed. 313; *U. S. v. Howland*, 17 U. S. (4 Wheat.) 108, 4 L. Ed. 526."

In *Murphy v. John Hofman Co.*, 211 U. S. 562, at 568, the Court said:

"But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdic-

tion of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, *though it is not authorized by any statute.* The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College,* 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver has no right to deliver it to him without the order of the court. *Whitney v. Wenman,* 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778." (Italics ours.)

Moreover Section 5671 of the General Code of Ohio must be read in the light of other provisions of the Ohio Code providing for the enforcement of the state's lien for taxes. Thus, Section 2667 of the Ohio Code provides:

"When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

Construing this Section, the Court of Appeals for Cuyahoga County, Ohio, on June 1, 1931, in the case of *Cook, County Treasurer v. Pomozi,* 35 O. L. B. & Rep. 50, held that the Court of Common Pleas had the authority to con-

firm a tax sale of premises free and clear of liens, even though the sale was for an amount less than the amount of taxes owing. Section 5692 of the General Code of Ohio provides:

> "When land so held by tenants in common are sold upon proceedings in partition, or taken by the election of any of the parties to such proceedings, or real estate is sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes and penalties, and the interest thereon against such lands, to be discharged out of the proceeds of such sale or election."

This Section has likewise been construed as giving the courts all the power and authority necessary to discharge the lien for taxes out of the proceeds of any judicial sale. *Ketchum v. Fitch,* 13 O. S. 201; *Hoglen v. Cohan,* 30 O. S. 436; *Markley v. Whitmore,* 61 O. S. 587. The identical question raised by respondent was raised in the case of *In re Prince & Walter,* 131 F. 546 (D. C. Pa.), in which the court said, on page 549:

> "But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. In *re Veitch,* 4 Am. Bankr. Rep. 112, 101 Fed. 251. In *re Brinker* (D. C.) 128 Fed. 634; *City of Waco v. Bryan* (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, *J.*). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in

the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. In *re Keet*, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed."

See also *Isaacs v. Hobbs Tie & Timber Company*, *supra*, and *Straton v. New*, *supra*.

The cases of *Security Trust Co. v. Root*, 72 O. S. 535, and *Stokes v. Georgia*, 42 Ga. 412, do not support respondent's contention. In *Security Trust Co. v. Root* the question arose as to whether the holder of a tax title, procured during the pendency of foreclosure proceedings, had superior title to the purchaser at a subsequent foreclosure sale. The court held that the holder of the tax title was by statute subrogated to the rights of the state, that the issuance thereof was a matter of record and that the holder thereof, *not having been made a party to the foreclosure proceedings*, had the superior title. In *Stokes v. Georgia* the Supreme Court of Georgia held that the purchaser at bankruptcy sale, free and clear of encumbrances, did not procure a title free of taxes, *because the state of Georgia had not been made a party to the bankruptcy proceedings*. Such a situation is entirely different from that in the case at bar in that in the case at bar respondent was made a party to the proceedings in the bankruptcy court and he there set up the same lien which he now seeks to assert. In the recent case of *Baldwin v. Iowa State Travelling Men's Association*, 282 U. S. ...., 51 S. C. Rep. 517, 75 L. Ed. 667, decided May 18, 1931, Mr. Justice Roberts said:

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters

once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

In the case at bar respondent, in compliance with a notice sent him by the bankruptcy court, filed in the bankruptcy court his claim for taxes. The bankruptcy court found such taxes to be a third lien upon the bankrupt's real estate and ordered the same to be transferred from the real estate to the fund to be derived from the sale thereof and ordered the real estate sold free and clear of respondent's lien. If respondent was aggrieved by such order, he had a right to file a petition in the District Court for a review of the same. Not having done so, it is submitted that he cannot now successfully assert that he has a lien on such real estate, particularly in view of the fact that petitioner, in purchasing such real estate, purchased the same relying upon the order of the bankruptcy court, made in a proceeding to which respondent was a party, that the same was free and clear of respondent's lien. In *Lesser v. Gray*, 236 U. S. 70 (1915), the bankruptcy court disallowed a claim against a bankrupt partnership arising out of a contract for the future delivery of cotton bagging. The reason assigned by the referee was that an implied condition of the contract terminated it when involuntary bankruptcy proceedings were instituted and that no legal injury resulted. After a discharge in bankruptcy had been granted the partners, suit was instituted against them in the state court for damages arising out of the breach of the same contract. Upon demurrer such suit was dismissed. Error being prosecuted to this Court, Mr. Justice McReynolds said:

"The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach, and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge. In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. *No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute, and that result may not be obtained indirectly through the present proceeding.* The judgment of the court below is affirmed." (Italics ours.)

It is respectfully submitted that respondent is bound by the order of the bankruptcy court and that he now has no lien upon or claim to the real estate of petitioner for taxes for the years 1924, 1925, 1926 and 1927; that the judgment of the Court of Appeals of Trumbull County, Ohio, should be reversed and final judgment entered in this cause for petitioner, quieting his title to the real estate described in his petition against the claim of the respondent for taxes for the years 1924, 1925, 1926 and 1927.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 54.

I. J. VAN HUFFEL,
Petitioner,

v.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TRUMBULL COUNTY, OHIO.
WRIT GRANTED MAY 25, 1931.

REPLY BRIEF OF PETITIONER.

Due to certain questions raised for the first time by respondent in his supplemental brief, counsel for petitioner file this their reply brief.

I.

A PLENARY SUIT WAS NOT NECESSARY OR REQUIRED.

It is claimed in the supplemental brief of respondent that the Bankruptcy Court never acquired jurisdiction over the person of the respondent, first, because there is no provision in the Bankruptcy Act providing for the mailing of notice respecting the filing of a petition for authority to sell real estate and marshal liens thereon, and second, be-

cause a proceeding to determine the priority of liens is a plenary proceeding. These questions are here raised for the first time and it is submitted that they are wholly without merit.

By Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act), creditors are entitled to ten days' notice by mail of all proposed sales of property, and it is claimed that this does not authorize a notice by mail of the filing of a petition for an order to sell, free and clear of liens, and to marshal the liens upon the property. The argument must fall of its own weight, for certainly a petition by a trustee for an order to sell is one to make "a proposed sale," and it is necessary for such petition to be complete that it ask for a sale either subject to incumbrances or free from incumbrances, and, if free from incumbrances, that the same be marshalled and their priority determined. Consequently, the fact that such petition asks for an order marshalling liens and authorizing the sale of the property free and clear of liens, in no wise detracts from the fact that the petition is one for "a proposed sale."

At the time the application was filed notice was given to all creditors of the hearing to be had upon such application (R. 20), and in addition thereto *lien claimants named as parties defendant* in such application were given a specific notice (R. 21), part of which read as follows:

> "Unless your interest is set up by proper pleading at or prior to said hearing, an order will be entered finding that you have no lien." (R. 22.)

Both of these notices were received by the respondent (R. 22) and in response thereto he mailed to the Referee a statement of the taxes due upon the real estate herein involved. He thus submitted himself to the jurisdiction of the court without objection. The fact that neither the respondent nor his counsel, the Prosecuting Attorney, ap-

peared at the hearing, paid no further attention to the proceedings, and had no actual knowledge of the findings of the Bankruptcy Court, determining the priority of liens, until some eight months afterward (R. 23), does not detract one iota from the fact that the respondent submitted himself to the jurisdiction of the court and that the court had jurisdiction to enter the order which it made.

The argument advanced that a proceeding to determine priority of liens is a plenary proceeding is equally groundless. The respondent never had possession of the real estate in question but, as found by the Court of Appeals (R. 19), the bankrupt was the owner and was in possession on the very day it was declared a bankrupt, and naturally the Trustee in Bankruptcy succeeded to the bankrupt's title and possession. That a plenary suit is not necessary where the Bankruptcy Court has possession of the *res* is well settled. In the case of *Taubel-Scott-Kitzmiller Co. v. Fox*, (1924), 264 U. S. 426, wherein the bankruptcy court, by summary process, attempted to dispossess a sheriff of the bankrupt's property, which the sheriff had seized under a writ of execution issued upon a judgment obtained within four months of bankruptcy, but at a time when the bankrupt was still solvent, Mr. Justice Brandeis said, on pages 433 and 434:

> "Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of §67, under subdivision b of §60, and under subdivision e of §70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

that the State of Ohio cannot be sued except in cases specifically authorized by statute. While this is true, it is equally true that the respondent is the person charged by the laws of the State of Ohio with the collection of taxes due, he is authorized to sue and be sued, and in proceedings instituted for the collection of taxes it is not necessary that the State be made a party thereto but the State shall "be deemed a party through and represented by the County Treasurer." (See Statutes of the State of Ohio set forth in Appendix A hereof.)

A similar question was raised by the Collector of Internal Revenue in the case of *In re Anderson*, 279 Fed. 525, wherein it was contended that service of a show cause order upon the Collector of Internal Revenue was not the equivalent of service upon the United States. The court said:

> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. The notice of lien against all the property and rights of property belonging to the bankrupt was filed in the office of the clerk on July 6, 1920, and was recorded. The claim of the United States thus became a public record of which the trustee had to take notice. Notice of hearing on the petition was given to the collector, so that the United States might have opportunity to establish its claim. The official charged with the duty of collecting taxes is the collector of internal revenue, and it was he who filed a claim. It is he who serves notices upon delinquents and receives all payments under Revised Statutes, §§3183, 3184 (Comp. St. §§5905, 5906), and it is he who distrains and sells upon the distress. Section 3187 (Comp. St. §5909). All the duties devolving in such proceeding are those of the collector of internal revenue. He is the proper person to be notified to be brought into court on a proceeding such as the one instituted below. The court granted 10 days after the

service of a copy of the order within which to move to dispute the merits of the finding of the referee below. This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

Respondent in the case at bar occupies identically the same position with relation to the State of Ohio as that occupied by the Collector of Internal Revenue in his relation to the United States. What is true of the Collector of Internal Revenue under such circumstances must be equally true of the respondent. Carrying it to the logical limit, the suggestion of counsel for respondent would seem to deny the right of the referee to call the taxing authorities into his court for any purpose. If this be true, by what process can the taxes be ordered paid and the estate closed?

The contention of the respondent that there is only one method authorized for attacking taxes in Ohio, and that that method is to be found in Section 12075 of the General Code of Ohio, is also erroneous. Section 12075 provides as follows:

"Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments; and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Petitioner could not file any suit to enjoin a levy of the taxes here involved for the reason that they had been levied in the years 1924, 1925, 1926 and 1927, prior to the bankruptcy proceedings of The Sterling-Knight Company and prior to the time that the petitioner acquired title to the premises in question. Petitioner was not entitled to

enjoin the collection of such taxes for the reason that the Treasurer had a perfect right to collect the same from the bankrupt estate of The Sterling-Knight Company. Petitioner's only remedy was to enjoin the respondent from asserting any lien upon the premises in question for taxes which he claimed to be due for the years 1924, 1925, 1926 and 1927, a remedy which is obtained through the filing of a suit to quiet title. Moreover, the Supreme Court of Ohio in the recent case of *Conn v. Jones*, 115 O. S. 186 (1926), found and determined that the remedy provided for in Section 12075 was not exclusive but was cumulative to other remedies provided for by law.

II.

PETITIONER IS AN INNOCENT HOLDER FOR VALUE.

In respondent's brief it is contended that the petitioner is not an innocent holder for value inasmuch as the taxes, the lien of which is here in dispute, remained unpaid on the tax duplicate of Trumbull County, which was a public record of which petitioner was bound to take notice. The record of the proceedings had in the bankruptcy of The Sterling-Knight Company in the District Court of the United States for the Northern District of Ohio, Eastern Division, was likewise a public record of which petitioner was bound to take notice. In the latter public record it was disclosed that the lien of the respondent for the taxes here in question had, by order of the Bankruptcy Court, been removed from the premises in question and transferred to the funds to be derived from the sale thereof. It was upon this public record that the petitioner relied in accepting a deed to the premises, subject to taxes only for the year 1928 and thereafter, and he did not choose to rely solely upon the warranty of his grantor.

On pages 8 and 9 of respondent's brief attention is called to the fact that the premises here in question sold

for less than the amount even of the first mortgage, to say nothing about taxes and other liens, and that out of the proceeds of the sale of the mortgaged property $19,171.46 was applied to the payment of the costs of administration, and it is stated that the practice in bankruptcy courts is, where real estate is of less value than the encumbrances, to abandon the property and that that is what should have been done in the instant case; that the costs of administration were paid and the proceeds of the sale of the mortgaged property were distributed long before the respondent "learned anything of the attempt to avoid the payment of the taxes due the State of Ohio." It seems that the inference respondent desires us to draw from this argument is that the mortgage holders attempted in some way to avoid the payment of the taxes here in question. No such argument or contention was made in the courts below, and should this Court feel that there is any merit in such contention the record can be diminuted to show that the same is wholly without merit, for the record below, based upon which the Court of Appeals of Trumbull County made its findings of fact, shows that The Union Trust Company, Trustee, first mortgagee, The Old Dominion Mortgage Company, second mortgagee, and The Second National Bank of Warren, pledgee of the mortgage of The Old Dominion Mortgage Company, all answered the Trustee's petition to sell, requesting in their answers that the property be abandoned for the reason that there was no equity therein for general creditors. Notwithstanding such answers and the position of the mortgagees therein taken, the Referee in Bankruptcy ordered the Trustee in Bankruptcy to sell the premises, free and clear of all encumbrances.

It is perfectly true that the purchase price of $75,000.00 was, at the bankruptcy sale, paid in first mortgage

bonds with no money changing hands, and that the expenses of such sale were paid out of the proceeds of the sale of mortgaged personal property belonging to the same lien claimants, from the sale of which was realized $96,527.30. Had the Referee in Bankruptcy found that the taxes were a first lien upon the property, or had his finding that they were a third lien been reversed upon petition to review, the first mortgagee, who bid the property in at bankruptcy sale, would have had to pay the amount of those taxes in cash. An order to that effect made by the Referee or the reviewing court would have been binding upon the purchaser-mortgagee. Moreover, this argument is one which might perhaps be made if this action were one between the mortgagees and the respondent. The action, however, is not one between the mortgagees and the respondent but is between the respondent and a purchaser from the mortgagee, who in purchasing relied upon an unreversed, unmodified judgment of the Bankruptcy Court in a proceeding to which respondent was a party, in which he appeared and set up his claim, and in which it was ordered that the lien which respondent now seeks to assert against the premises in question be transferred from such premises to the funds to be realized from the sale thereof, and of which funds there were ample if he had chosen to follow them.

III.

THE BANKRUPTCY COURT DID HAVE JURISDICTION TO TRANSFER THE LIEN OF THE STATE FOR TAXES FROM THE PROPERTY TO THE FUND TO BE DERIVED FROM THE SALE THEREOF.

In respondent's supplemental brief upon this point but one additional argument is advanced in favor of his position that the Bankruptcy Court did not have power to transfer his lien for taxes from the property to the fund to be derived from the sale thereof, and that is that the Bankruptcy Act in all of its provisions assumes to protect the taxes due the sovereign states and that these taxes are not affected by a discharge in bankruptcy. True it is that the Bankruptcy Act in all its provisions assumes to protect the taxes due to the sovereign states, but in the case at bar respondent did not see fit to avail himself of the provisions of the Bankruptcy Act enacted for the purpose of protecting the same. In other words, the Bankruptcy Court was not without jurisdiction. At most it committed an error in holding the lien of the respondent to be a third lien upon the premises in question. Such a finding could have been corrected under the provisions of the Bankruptcy Act, had respondent given any attention to the proceedings had before the Referee, of which he was notified and in which he appeared and set up his claim. Having contented himself merely with the filing of his claim and not having seen fit to pay any further attention to the proceedings, he most certainly is not now in a position to complain. While the obligation to pay taxes assessed upon real property may not be affected by a discharge in bankruptcy, there is nothing in the Bankruptcy Act which forbids the Bankruptcy Court, with all interested parties before it, from transferring the lien of such taxes from the property of the bankrupt to the fund to be derived from the sale of such property, thereby discharg-

ing the *property* from the lien thereof. That the Bankruptcy Court has such power seems clear from the statutes and authorities to which attention has heretofore been called.

Respectfully submitted,

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APPENDIX A.

The following Sections of the General Code of Ohio show that the respondent is the officer who by law is charged with the duty of collecting taxes, and that he can both sue and be sued:

"§2658. *Collection of overdue taxes by distress.*—When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and the place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

"§2660. *Proceedings when unable to collect taxes by distress.*—If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, which rule shall have the same force and effect as a judgment at law and shall be enforced by attachment or execution or such process as the court directs."

"§2667. *Action by treasurer for unpaid taxes or assessments.*—When taxes or assessments, charged

against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

"§2669. *Petition and evidence.*—Having made the proper parties, it shall be sufficient for the treasurer to allege in his petition that the taxes and assessments, or either, are charged on the tax duplicate against such premises, the amount thereof, and are unpaid, and he shall not be required to set forth in the petition any other or further special matter relating thereto. On the trial a certified copy of the entry on the tax duplicate, shall be prima facie evidence of such allegations and of the validity of such taxes and assessments."

"§2670. *Judgment and decree.*—Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, *it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer.*" (Italics ours)

"§5674. *Collection of tax of transient trader.*—When the county auditor certifies to the county treasurer the amount of tax assessed upon a return made

by or for a transient trader, under chapter three of this title, the treasurer shall forthwith enter it upon the duplicate and notify such trader of the amount assessed. If he neglects or refuses to pay the amount within twenty-four hours after receiving such notice, the treasurer shall collect it by any process or proceeding authorized in a case of delinquent personal property tax."

"§5695. *Collection of taxes.*—The county treasurer shall forthwith *collect* the taxes and penalty on the duplicate *by any of the means provided by law,* and the funds so collected shall be distributed in proper proportions to the appropriate funds." (Italics ours)

"§5697. *How treasurer to collect delinquent personal tax.*—When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid thereon, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto."

"§5700. *When county officer allowed counsel.*—When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the

To the same effect see *First National Bank v. Chicago Title & Trust Co.*, (1905) 198 U. S. 280; *Whitney v. Wenman*, (1905) 198 U. S. 539.

The cases of *Ray v. Norseworthy*, 90 U. S. 128, and *Factors & Traders Insurance Co. v. Murphy*, 111 U. S. 738, and *In re Henderson*, 206 Fed. 139, are not authorities in favor of respondent's position that a proceeding to determine the priority of liens, where the bankruptcy court is in possession of the property, is a plenary proceeding. These cases are merely to the effect that a lien claimant cannot be dispossessed of his lien without notice. In the case of *Ray v. Norseworthy, supra*, the court said:

> "Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts and circumstances which it is supposed justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests and, consequently, must be properly notified and summoned to appear for that purpose. *Foster v. Ames*, 1 Low. 316; *Willard v. Brigham*, 25 La. Ann. 601.
>
> "None of these conditions were fulfilled in this case. Instead of that the State Court finds that the petitioner was never properly notified and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State Court decided that his rights were unaffected by the proceedings."

In the case at bar the Court of Appeals in its Finding of Fact No. 4 (R. 20) specifically found that, upon the filing of the petition to sell, the Referee "in the manner

and form as provided by the Bankruptcy Laws of the United States mailed to all known creditors" notice of the filing thereof and of the date set for hearing the same. Further, that, upon the filing of such petition, the Referee "mailed to those named as claiming any lien upon the property" an additional notice, to which was appended the following:

> "Unless your interest is set up by proper pleading at or prior to said hearing an order will be entered finding that you have no lien." (R. 22.)

The Court of Appeals further found that the notices so mailed were received by the respondent, "who, upon receipt thereof, mailed to the Referee a statement of the taxes due." Thus, in the case at bar the state court expressly found that the respondent had been notified "in the manner and form as provided by the bankruptcy laws of the United States." It is thus apparent that the respondent had due opportunity to defend his interest, and that he failed so to do is no excuse for the situation in which he now finds himself. *In re De Angeles,* 36 Fed, 2d. 218 (C. C. A. 10th Circuit 1929).

Moreover, even though a proceeding to determine the priority of liens were to be classed as a plenary proceeding, respondent, having been notified of the summary proceedings taken and having filed in response to such notice his statement of taxes due without objecting to the character of the proceeding, cannot now be heard to complain that the proper procedure was not adopted. *In re Rockford Produce & Sales Co.,* 275 Fed. 811 (C. C. A. 7th Circuit 1921); *Board of Trade v. Johnson,* 283 Fed. 374 (C. C. A. 7th Circuit 1922); *In re Hollingsworth & Whitney Co.,* 242 Fed. 753 (C. C. A. 1st Circuit 1917).

It is further claimed on behalf of respondent that he is purely a ministerial officer of the State of Ohio and

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MAY 15 1931
CHARLES ELMORE CRO
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In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 54

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TRUMBULL COUNTY, OHIO.

BRIEF OF RESPONDENT
Opposing Petition for a Writ of Certiorari.

G. H. BIRRELL, *Prosecuting Attorney,*
Trumbull County, Ohio,
GEO. W. SECREST, *Assistant Prosecuting Attorney,*
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 906.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,

Respondent.

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GEO. W. SECREST, *Assistant Prosecuting Attorney,*

Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 906.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TRUMBULL COUNTY, OHIO.

BRIEF OF RESPONDENT
Opposing Petition for a Writ of Certiorari.

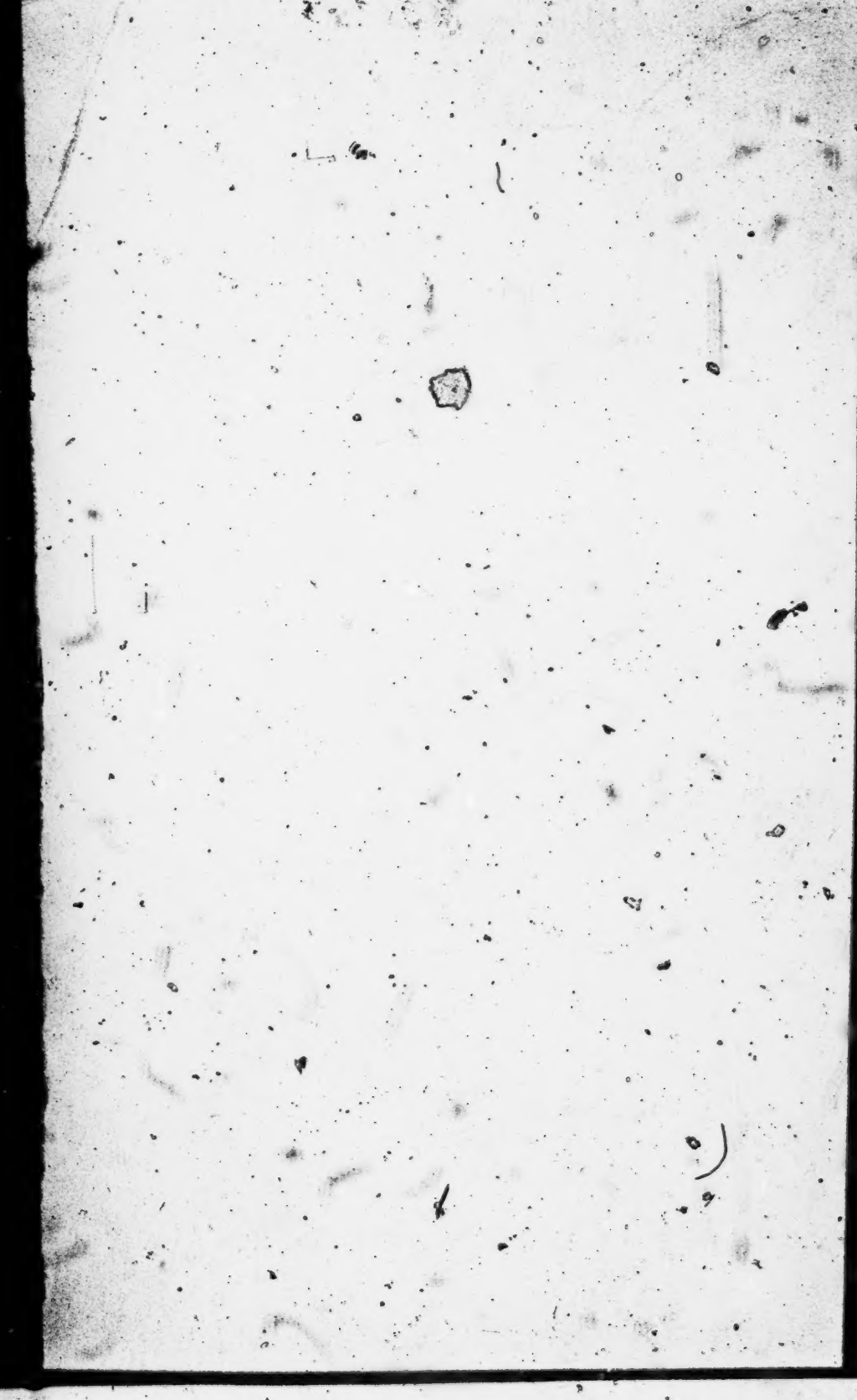
To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The brief of the respondent, Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, is herewith submitted for the consideration of this Honorable Court:

public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages, and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

"§5701. *County solicitor to attend such suits.*—In each county in which there is a county solicitor, or a board of control having a soliciter, the county solicitor and the solicitor of such board shall take charge of and attend to all actions against any county officer in such county for performing, or attempting to perform, any of the duties authorized by law. Such officers shall not employ any other counsel to defend such action or suit."

Under this section in *Brewster v. Anderson*, 1 O. C. C. 268, it was held that appearance for officers in tax recovery may be entered by the County Solicitor.



II.

ARGUMENT.

I. Did the Bankruptcy Court, without making other provisions for the payment of the taxes in question, have jurisdiction to issue its decree divesting the State of Ohio and Trumbull County of their lien for taxes against the real estate of the bankrupt, where such taxes have been legally and lawfully assessed and made a permanent lien by the laws of the State of Ohio until paid or otherwise discharged by law; or is such a decree, which in effect destroys the right of the State and County to collect such taxes, in excess of the jurisdiction of the Bankruptcy Court thereby rendering such decree void and open to collateral attack?

The statement of the proposition of law involved, on page 22 of the petitioner's brief, is misleading to the Court by reason of the fact that it is not comprehensive of the whole situation. The sole question there presented is whether the Court of Bankruptcy could order the real estate of the bankrupt sold free and clear of the lien of the State of Ohio and Trumbull County for taxes and transferring such lien from the real estate to the fund derived from the sale thereof. This omits entirely from consideration that part of the decree which made the lien of the State subsequent to that of the first and second mortgages which in effect, not only transferred the lien of taxes to the fund arising from the sale, but in effect destroyed the lien which was intended to be made permanent by the laws of the State until paid.

The first point raised is as to the jurisdiction of the Court of Appeals to inquire collaterally into the validity of the judgment rendered by the Federal Court in the bankruptcy proceedings of the Sterling-Knight Motor

Company. The doctrine that a judgment in a case, of which the Court has once acquired jurisdiction, cannot be collaterally assailed is only correct where the Court proceeds, after acquiring jurisdiction, according to the established modes governing the class to which the case belongs; and does not transcend, in the extent or character of its judgment, the law which is applicable to it. Where the Court transcends the limits of its authority, its judgment is not merely erroneous but is entirely void:

> "Although a court may possess jurisdiction of a cause of the subject matter and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judiciously in all things, and cannot then transcend the power conferred by law."
>
> *Windsor v. McVeigh*, 93 U. S. 274-282, 23 L. Ed. 917.

The consequences of a void judgment are found in *Black on Judgments*, Second Edition, Vol. 1, Section 170, page 248, where the following language appears:

> "Now a 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported

by no presumptions, and may be impeached in any action, direct or collateral."

In that text reference is also made to a decision of the Supreme Court of the United States, where, in the case of *Elliot v. Peirsol,* 1 Pet., 328, at 340, 7 L. Ed., 164, the Court said:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not avoidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

From these decisions, and there are many others, for the question is elemental, it appears that a judgment rendered by a Court in excess of the jurisdiction conferred is absolutely void, and a nullity with no force and effect whatsoever, which judgment may be impeached in any proceedings whether direct or collateral.

The next question to be raised concerns the jurisdiction of a Court of Bankruptcy, with respect to the lien of the State and County for taxes.

Generally speaking, the origin of the Courts of Bankruptcy is statutory and they have no further powers or jurisdiction than is specifically conferred on them, or necessarily implied from the statutes creating them. That is to say, their jurisdiction is limited, and their judgments possess only those attributes of finality which are acquired through the exercise of the statutory jurisdiction conferred upon them:

Elmira Steel Co. (D. C., N. Y.) 5 Am. B. R. 484, 109 Fed. 456;

In re: Williams (D. C., Ark.) 9 Am. B. R. 741, 120 Fed. 38;

Brumbey v. Jones (C. C. A., 5th Cir.) 15 Am. B. R. 578, 141 Fed. 318;

Houston v. Shear (Tex. Ct. of Civ. App.) 43 Am. B. R. 462, 210 S. W. 976;

Matter of Hollins (C. C. A., 2d Cir.) 36 Am. B. R. 168, 229 Fed. 349.

Section 104, Title 11, U. S. C., §64 (a) of the Federal Bankruptcy Act, dealing with the question of priorities, says in part:

> "The court shall order the trustees to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: PROVIDED, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, *and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.*" (Italics ours.)

We wish to call the Court's particular attention to the last phrase above cited, by the terms of which the only power conferred upon the Bankruptcy Court is to inquire as to the *amount* or *legality* of such tax. There is no question involved in the case at bar either as to the legality of the tax imposed or as to the amount thereof. The question relates solely to the power of the Bankruptcy Court to divest the lien of the State and County for its taxes, and if the Court inquired into the taxes other than as to their legality, or their amount, then it was exercising an authority in excess of the jurisdiction conferred upon it by the Bankruptcy Act.

This is clearly the intent of the Statute, inasmuch as it requires the Trustee to pay all taxes, legally due and owing by the Bankrupt, to the various taxing powers of the country. It is not a question of an erroneous judgment upon the part of the Bankruptcy Court, but it is a question which goes directly to the root of the Court's jurisdiction, and there is no question but that the Bankruptcy Court, in disturbing the lien of the State for its taxes, exercised a jurisdiction which was not conferred upon it by the Statutes creating the Court.

As a further aid in determining this question it might perhaps be of value to inquire into the general nature and extent of the taxing power of the State. This right to levy and collect taxes has always been recognized as one of the supreme powers of the State, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, as long as it keeps within the rights of the citizens, and does not impair the constitutional protection given them. It is a power exercised and controlled by legislative authority only, and not by the judiciary:

Union Pac. R. R. v. Peniston, 18 Wall. 5, 21 L. Ed. 787;
Leigh v. Green, 193 U. S. 79, 48 L. Ed. 623;
Thompson v. Allen Co., 115 U. S. 550, 29 L. Ed. 472;
Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763;
Cleveland v. Edwards, 109 O. S. 598, at page 604;
Western Union Telegraph Co. v. Mayer, 28 O. S. 521.

In the last cited case, we find the following words at page 533:

> "The power of the state to collect taxes for public purposes, is an inherent and indispensable incident of sovereignty. Without it no civilized state could discharge its functions."

Acting under the authority delegated to it the Legislature of Ohio enacted what is now known as Sec. 5671 of the General Code of Ohio which reads as follows:

> *"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes* on the day preceding the second Monday of April, annually, *and continue until such taxes, with any penalties accruing thereon, are paid.* All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate." (Italics ours)

The purport of the above Statute is that the taxes, together with the penalties accruing thereon, are a permanent lien against the real estate assessed, which lien is perpetual and can only be removed by payment in full or be discharged according to other provisions enacted by the Legislature.

In the case of the *Security Trust Company v. Root*, 72 O. S. 535, the question arose as to whether the purchaser at a tax sale had a title paramount to that of a purchaser of the same real estate acquired through the sale of the same property in a foreclosure proceedings pending at the time of the tax sale. The Court held that the title of the purchaser at the tax sale was paramount, and said in part in its opinion:

> "* * * The lien of the state for taxes could not be ousted by a sale in foreclosure, and the state's lien having been, by virtue of this statute, transferred to the purchaser at the sale, it was neither satisfied nor discharged by the decree in foreclosure and the sale thereunder. The taxes were a lien paramount to all other liens and claims when the foreclosure suit was commenced, and the taxes were then delinquent as shown by the treasurer's duplicate, and before decree

the auditor's duplicate gave constructive notice that the defendant had purchased and had acquired a tax certificate. * * *"

In the above case the opinion of the Court of Appeals is found in 4 O. C. C. (N. S.), 129, and the Court in a well reasoned opinion commented upon the lien of the State for taxes as follows:

> "The lien of taxes on land, in favor of the state, and the right of the state to proceed to the collection thereof, in the mode provided by law, are paramount to the ownership or interests of private parties, and are not affected by the circumstance that a suit may be pending to foreclose and extinguish the title of the owner. It is not necessary or proper to make officers, upon whom the duty devolves to collect these revenues, or the state, or political bodies to which these revenues go, parties defendant to the action. The government and its officers are not to be hindered, delayed or obstructed in proceeding according to law to collect taxes for the support of the government, by the litigation of private persons with respect to rights and interests subordinate to the claims of the state."

The State of Ohio having the sovereign power of taxation, and giving to its Legislature the right to enact such laws as are within the constitutional limitations, and the Legislature having provided that the lien of the State for taxes against real estate may be removed only through payment, or through the provisions of the act for the sale of delinquent land taxes, the question then arises as to whether or not the sale of this property, free and clear of encumbrances, by the Trustee in Bankruptcy, would have the effect of removing the lien of the State for taxes legally assessed against the premises in question.

In the case of *Osterberg v. Trust Co.*, 93 U. S. 429, 23 L. Ed. 964, the Court held, in its opinion, as follows:

"* * * A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, * * *."

To this same effect is the case *In re Veitch,* 101 Fed. 251, where it was held:

"Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of the state), is sold to the mortgagee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured."

The Supreme Court of Ohio, in the case of *Monroe v. Doe,* 7 O. 262, held that the Statute of Limitations did not apply to any proceedings brought for the sale of property for delinquent taxes, and in its opinion the Court said in part, at page 265, as follows:

"* * * True, the land taxed is not forfeited to the state until it has been offered for sale. But still, the state has a lien upon all land not exempt from taxation, which is calculated to be perpetual, and which can not be affected by any sale or transfer. 29 Ohio Stat. 278. Neither will any length of possession affect this lien. *It can be removed in no other way than by the payment of all taxes, penalties, and interest due upon the land.* * * *"

Perhaps most nearly in point of any of the cases which we have been able to find upon this subject is the case of *Stokes v. State of Georgia,* 42 Ga. 412, 12 A. R. 588. In that case the purchaser of certain real estate bought at a

bankrupt sale, under order of the bankruptcy court, free and clear of all encumbrances, attempted to defend the sale of his property by the State for taxes on the ground that the same had been purchased from the Trustee in Bankruptcy free and clear of encumbrances. The opinion of the Court, which is short, is here quoted in full:

> "1. It has been said by a judge of a United States Court that 'the power of taxation is a sovereign political power, and a branch of the power of eminent domain.' Brightley's Fed. D. 158. Georgia expressly retains this power over all property in the State, and follows the property for the payment of her taxes, in whosoever hands found. The tax payer cannot dispose of his property so as to divest her of this right. Code, 809, 810, 811. The bankrupt law does not attempt to deprive a State of this power. True, it makes provision for the payment of the State taxes, if the State chooses to come into the bankrupt court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot divest the right of the State to enforce the payment of her taxes on the property, wherever it may be found.
>
> 2. If it is true that the property is bound for the taxes, it makes very little difference who the owner of that property is, or how a tax execution describes it, so it is done with sufficient definiteness to enable the levying officer to ascertain the property."

The above case has been cited with approval and followed in the case of *Mesker v. Koch*, 76 Ind. 68.

The general authority granted to Congress by Art. 1, Sect. 8, paragraph 4, of the Constitution is limited by the definition of the term "bankruptcies." (p. 24 Brief.) In England at the time this phrase was used in the Constitution, the laws on bankruptcy were held not to affect the rights of the Sovereign State to collect its revenues.

United States vs. Herron, 20 Wall. 251, 22 L. Ed. 275, 87 U. S. 251.

At page 278 Mr. Justice Clifford says:

> "Nor does the bankruptcy act impair or supersede the laws for the collection of taxes,"

and he further observes:

> "Greater unanimity of decision in the Courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts federal or state * * * of this country."

Woodyard vs. Sayre (W. Va.), 110 S. E. 689; 24 A. L. R. 1497, 2 syllabus:

> "At common law the state had the prerogative right independently of statute to preference and priority of payment over all general creditors for all debts, taxes or other demands in the distribution of the estate of an insolvent debtor."

Marshall vs. New York, 254 U. S. 380, 65 L. Ed. 315.

The sovereign states therefore never surrendered to the United States the power to authorize a bankruptcy court to interfere with their revenues, nor have the bankruptcy courts attempted to assume such power.

2. The Court of Appeals of Trumbull County, Ohio, gave full faith and credit to the judgment and decree of the District Court of the United States.

It will clearly appear from the opinion of the Court of Appeals of Trumbull County (R. 13) that full faith and credit was given to the judgment and decree of the District Court of the United States. Full faith and credit does not mean that the Court of Appeals was bound to follow the decision of the District Court when that decision was clearly in excess of the jurisdiction conferred upon it by the Bankruptcy Act, and amounted to an interference with the sovereign right of the State of Ohio to collect its taxes in the manner provided by its laws.

I.

SUMMARY STATEMENT OF POINTS OF FACT AND OF LAW.

In the matter of the Sterling Knight Motor Co., Bankrupt, pending in the United States District Court for the Northern District of Ohio, Eastern Division, the trustee in bankruptcy filed his petition to marshal the liens against certain real estate belonging to the bankrupt, situated at Warren, Trumbull County, Ohio, praying for an order to sell the real estate free and clear of encumbrances and that the liens be transferred to the funds arising from the sale.

In this proceeding, the Treasurer of Trumbull County, Ohio, was named a party defendant, a notice of the pendency of the action was mailed to him, and thereafter he mailed to the referee in bankruptcy a statement of the taxes appearing on his records, but he did not enter any further appearance nor was he present at any of the hearings before the referee, in person or represented by counsel.

The referee ordered the property sold free and clear of encumbrances and transferred the liens against the property to the fund arising from the sale. In his decree the court found that the taxes were correct in amount and legally assessed, but that the lien of the State of Ohio and Trumbull County for such taxes against the real estate was a third lien and subsequent to the liens of both the first and second mortgages.

The property was subsequently sold pursuant to the order of the referee, and was purchased at the sale by The Union Trust Company of Cleveland, Ohio, as Trustee for the first mortgagee, for an amount much less than the value of its mortgage, which mortgage was set off against the purchase price so that no fund was created

from which the taxes could be paid. No proceedings were brought by the Treasurer to reverse the finding of the referee for the reason that he did not know of the finding until the time for instituting error proceedings had expired. Subsequent to the sale and purchase, The Union Trust Co., Trustee, conveyed the premises to a holding company, The Warren-Cleveland Company, which in turn conveyed by warranty deed to I. J. Van Huffel, the petitioner in this cause.

The taxes remaining unpaid upon the records of the Treasurer of Trumbull County, the petitioner brought this action in the Common Pleas Court of Trumbull County to quiet his title against the claim of the respondent for taxes, who by way of answer set forth the fact that the taxes in question appeared upon his records unsatisfied and unpaid, and prayed for the dismissal of the petition. By way of reply, petitioner set forth the proceedings in the bankruptcy court contending that, by virtue of the decree of that court from which error was not prosecuted, the matter was adjudicated by a Court of competent jurisdiction having jurisdiction of the subject matter and the person.

The foregoing is but a brief general statement of the facts involved, a detailed statement being found in the finding of fact by the Trumbull County Court of Appeals on page 19 of the Record.

The respect accorded the rights of the State by the Federal Courts is clearly set forth in the comments of Mr. Justice Brandeis in *Marshall vs. New York*, 254 U. S. 380, 65 L. Ed. 315 at page 318:

> "While by the common law of England and by that of New York the priority (of taxes) does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of the State of New York extended the prerogative right so as to give certain taxes priority over prior encumbrances. An extension of this nature is found in No. 197 of the Tax law which declares in respect to the annual franchise tax that 'such tax shall be a lien upon and bind all the real and personal property of the corporation * * * from the time when it is payable until the same is paid in full.' By reason of that provision the annual franchise taxes take take priority over encumbrances on the corporate property (reference) * * *. Whether the priority enjoyed by the State of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such the decisions of the highest state court as to the existence of the right and its incidents will be accepted by this Court as conclusive."

In our instant case the highest court of the State of Ohio, under a law similar to that of the State of New York has held that the taxes levied for the benefit of the State are a lien prior to other encumbrances (*Security Trust Co. v. Root*, 72 O. S. 535). It would seem that the doctrine of the *Marshall* case should apply, i.e., the United States should follow the interpretation of the State of Ohio with respect to the priority of its tax claims.

3. Conclusion.

From the cases and statutes above quoted, it is clear that the jurisdiction of the Bankruptcy Court is a limited jurisdiction, and that that court has no other or further jurisdiction than is specifically given it by the statutes

creating it or necessarily implied therefrom. These statutes specifically limit the jurisdiction of the Bankruptcy Court to an inquiry as to the amount and legality of the taxes imposed, and consequently give the Bankruptcy Court no right to divest the lien of the State for its taxes nor to disturb the priority of that lien.

The right of the State of Ohio to follow all real estate within its jurisdiction for the payment of taxes, is a sovereign right, which it never intended to delegate to the Federal Government and with which the Federal Government never intended to interfere and is a right with which no court can interfere unless the legislature has specifically given it jurisdiction. The fact that the decision here was rendered by the Federal Bankruptcy Court makes no difference, for neither that court nor any other court has jurisdiction to disturb the priority of the State for its taxes, nor to divest the real estate of the lien of such taxes; and any decree affecting such tax lien, either of a Federal Court or of a State Court, which exceeds the jurisdiction in the matter of taxes specifically granted by the Legislature of Ohio, is absolutely void, and is a nullity with no force and effect and may be impeached either directly or collaterally.

We are, therefore, of the opinion that the finding of the Court of Appeals of Ohio was correct and that the writ of certiorari herein prayed for should be refused.

Respectfully submitted,

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GEO. W. SECREST,
Assistant Prosecuting Attorney,
Attorneys for Defendant in Error.

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In the Supreme Court of the United States

OCTOBER TERM 1931.

No. 54.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TRUMBULL COUNTY, OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF RESPONDENT.

G. H. BIRRELL,
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Trumbull County, Ohio;

GEO. W. SECREST,
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ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF TRUMBULL COUNTY, OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF RESPONDENT.

ARGUMENT.

THE BANKRUPTCY COURT HAD NO AUTHORITY TO REMOVE THE LIEN OF THE STATE OF OHIO FOR TAXES AND THE DECISIONS OF THE SUPREME COURT OF THE STATE OF OHIO, AND OF THE COURT OF APPEALS OF TRUMBULL COUNTY ARE CORRECT.

I.

THE BANKRUPTCY COURT IN THIS CASE NEVER ACQUIRED JURISDICTION OF THE PERSON OF THE RESPONDENT, THE TREASURER OF TRUMBULL COUNTY.

After The Sterling-Knight Company had been adjudicated a bankrupt, a petition was filed with the Referee for an order to marshal liens and sell the real estate belonging

to the bankrupt, in which petition certain mortgage holders and others were named as parties defendant. (Paragraph 3, Finding of Fact, page 20 of Transcript of Record.)

Upon the filing of such petition, the Referee *mailed* notice to the Treasurer of Trumbull County. (Paragraph 4, page 20.)

After receiving, *by mail*, notice of the filing of this application, the Treasurer of Trumbull County *mailed, to the Referee, a statement of the taxes due upon the real estate.* (Paragraph 4, page 22.)

Neither the Treasurer, nor his counsel, the Prosecuting Attorney, was present at any of the proceedings; nor did they have any knowledge of the finding of the court, determining the priority of liens. (Paragraph 5, page 23.)

The *notice of public sale* mailed to the Treasurer, after the order of sale was made by the Referee, *did not state* that the property was to be sold "free and clear of encumbrances." (Paragraph 6, pages 23 and 24.)

From these facts it is clear that the laws governing such proceedings in the bankruptcy court were not complied with.

Notices may be mailed only under the circumstances provided in Sect. 94, Title 11 U. S. C. of the bankruptcy act, which reads as follows:

> "a Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where

they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge."

The only clause under which a notice referring to sales of property is authorized is in paragraph "a(4)", which provides that creditors shall have notice by mail of "all proposed sales of property." As mentioned above, the notice of the sale of property was given in this case, but did not contain any notification that the property was to be sold "free and clear of encumbrances." (Paragraph 6, pages 23 and 24.) There is no provision in this section for the *mailing* of notice respecting the filing of a petition to marshal liens upon real estate, and there is no provision in the bankruptcy act that provides that a notice may be *mailed* for such purposes.

A proceedings to determine the priority of liens is a "plenary" proceedings to which all claimants are entitled to be regularly summoned. The matter of summons has been determined in the case of *Ray v. Norseworthy*, 90 U. S., 128; 23 Law. Ed., 116; in which the court states, in speaking of the attempt to cancel and displace a mortgage without notice:

> "Creditors in such a proceeding must have due opportunity to defend their interests, and must be *properly notified and summoned* to appear for that purpose, or their rights will be unaffected by the proceedings."

This case was later approved in the case of *Factors' and Traders' Insurance Company vs. Murphy,* 111 U. S., 738; 28 Law. Ed., 582, in which the court says:

> "A sale of a bankrupt's property by order of the court, discharged from all liens, does not discharge the lien of one who has a mortgage on the property, but who was not a party to the bankruptcy proceedings."

In re Henderson, 206 Fed., 139, also holds that:

> Mere citation is not sufficient to bar mortgagee.

A general note with reference to cases discussing the difference between "plenary" and "summary" jurisdiction of the bankruptcy court is found in Title 11 United States Code Annotated Section 46, pp. 311-321,—but the above cited cases determine this question.

The requisites of a proper summons are determined by the rules of practice in Courts of Equity, referred to in the general orders in bankruptcy adopted by the Supreme Court of the United States, in conformity with the power conferred by Section 53, Title 11 U. S. C., of the Bankruptcy Act, to-wit:

> "All necessary rules, forms and orders as to procedure, and for carrying this act into force and effect, shall be prescribed and may be amended from time to time by the Supreme Court of the United States."

General order 37 reads as follows:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, *the rules of equity practice established by the Supreme Court of the United States shall be followed* as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and

pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

The rules of practice with respect to notices or summons, for courts of equity of the United States read as follows:

RULE VII.—PROCESS, MESNE AND FINAL.—*The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill;* and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

RULE XII.—ISSUE OF SUBPOENA—TIME FOR ANSWER.—Whenever a bill is filed, and not before, *the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff,* which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso.* Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately by each defendant, or a joint subpoena against all the defendants.

RULE XIII.—MANNER OF SERVING SUBPOENA.—*The service of all subpoenas shall be by delivering a copy thereof to the defendant personally,* or *by leaving a copy thereof at the dwelling-house* or usual place of

abode of each defendant, with some adult person who is a member of or resident in the family.

RULE XV. PROCESS, by whom served.—The service of all process, mesne and final, *shall be by the marshal of the district*, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

RULE XXIV.—SIGNATURE OF COUNSEL.—Every bill or other pleading *shall be signed individually by one or more solicitors of record*, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

It will be noticed that no subpoena was served upon the Treasurer of Trumbull County, as required by Rule VII, nor in the manner provided by Rules XII, XIII and XV; nor was any pleading subscribed by counsel filed in answer thereto as required by Rule XXIV. Therefore, proper steps were never taken to bring the Treasurer of Trumbull County into court, and no appearance was ever made by the Treasurer in the Bankruptcy Court. Since the Treasurer was not properly notified, and was not a party to this proceedings, the rule set forth in *Rag v. Norseworthy* and *Factors' and Traders' Insurance Company v. Murphy, supra*, applies, and the lien of the State for taxes cannot be affected.

Incidentally, the Treasurer of Trumbull County is a mere ministerial officer of the State of Ohio, and the County is merely a political subdivision of the State for administrative purposes:

Cincinnati vs. Jones, 24 O. C. C. (N. S.) 374 (Motion to certify overruled);

Hunter vs. Commissioners, 10 O. S., 515, p. 520;
State ex rel. vs. O'Brien, 95 O. S., 166.

The State of Ohio cannot be sued except in cases specifically authorized by Statute. There is only one method authorized for attacking taxes in Ohio, to-wit:

> §12075. JURISDICTION OF COURTS OF COMMON PLEAS AND SUPERIOR.—Common Pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

This is not a case which comes within the provisions of that section; and, in a foreclosure suit, the County Treasurer is neither a necessary nor a proper party to the action:

> *Security Trust Co. vs. Root*, 4 O. C. C. (N. S.) 129, approved 72 O. S. 535.

II.

PETITIONER IS NOT AN INNOCENT HOLDER FOR VALUE.

I. J. Van Huffel purchased this property "free and clear of all encumbrances, except taxes for the year 1928," and received a Warranty Deed therefor. At that time the taxes remained unpaid on the tax duplicate of Trumbull County, a public record of which he was bound to take notice:

> *Osterberg vs. Union Trust Co.*, 93 U. S. 424; 23 Law. Ed., 964;
> *In re Harvey*, 10 A. B. R., 567; 122 Fed. 745.

He chose to rely upon the warranty of his grantor in the face of the record of unpaid taxes of Trumbull County.

There were no unencumbered funds in the hands of the Bankruptcy Trustee, from which the taxes might have been paid. The real estate was sold to the first mortgagee, for the sum of $75,000.00—much less than its total claim of $231,000.00. Naturally, the first mortgagee was benefited, and should in equity have paid the taxes. In fact, according to the practice adopted by the Federal Courts, where real estate is of less value than the encumbrances, the Bankruptcy Court should have abandoned this property to the mortgagees, placing on them the burden of paying the taxes and adjusting the rights of other encumbrancers without making an additional expense for the bankrupt estate:

In re Veitch, 101 Fed., 251;
In re Brinker, 128 Fed., 634.

The sale of the mortgaged personal property amounted to $96,527.30, and this amount was paid to the first and second mortgagees on the personal property. Naturally, it would have been inequitable for the court to have taken property or money belonging to these mortgagees for payment of taxes to benefit the mortgagees on the real estate. In fact there was only $2544.46 of unencumbered funds in this estate, and it was necessary to secure contribution from the mortgagees in order to pay the cost of administration, totaling $19,171.46.

In fact, the Court of Appeals, in its original opinion, found that the first mortgagee was allowed to use, and apply the bonds secured by the first mortgage, as a set-off toward the payment of the purchase price, so that no money changed hands in this deal (p. 14 of Record.)

All of these amounts were settled and paid out long before the Treasurer of Trumbull County learned anything of the attempt to avoid payment of the taxes due the State of Ohio. (Paragraph 12, pages 25 and 26, Tran-

script of Record.) When he did learn of the order of the Bankruptcy Trustee, he was too late to take any action in that court because of the provisions of Rule XVII of the District Court of the Northern District of Ohio, to-wit:

> "Every petition for the review of an order made by referee shall be filed with the Referee within ten days from the entry of said order, but the Referee may, on written motion, and upon good cause shown, allow a longer time, not exceeding five days."

Under all these circumstances, and considering that this is a proceeding in equity, in which the Court will look through the form of the proceedings, and consider the basic principle of law applicable thereto, it is clear that the Treasurer of Trumbull County was never in a position to protect himself in this case, except by enforcing and maintaining the lien of the State for taxes, as he has done, against the real estate; whereas, on the other hand, the petitioner purchased the property knowing that taxes existed against the same, and chose to rely upon the warranty of his grantor, which, by this proceeding, expects to enrich itself in the amount of the taxes it should have paid to the State of Ohio.

III.

THE BANKRUPTCY COURT IS WITHOUT JURISDICTION TO SET ASIDE THE LIEN OF THE STATE FOR TAXES.

The general argument of respondent on this subject is set forth in the "Brief of Respondent Opposing the Petition for a Writ of Certiorari" in this case; and, (as we understand the practice in this Court), this Brief need not be repeated or re-written at this time. This general argument is supplemented by the written opinion of the Court of Appeals of Trumbull County, which is copied at pages 13 to 18 of the Transcript of the Record, and

which was approved by the Supreme Court of Ohio. This general argument is further amplified as follows:

A. The petitioner, in his "Brief in Support of the Petition for Writ of Certiorari," admits that the particular question here involved, (to-wit: *Whether an order can be made as against the lien of the State for taxes*), has not been passed upon or decided; and his argument in support of his position is:

> "It would seem, * * *, that, inasmuch as a bankruptcy court must of necessity be authorized to sell property free of all encumbrances * * * there is no reason * * * why that doctrine should alone apply to lien claimants other than the Government, State or County." (Page 28)

The answer to this proposition is indicated by his further statement:

> "There is nothing to be found in the Bankruptcy Act which expressly authorizes the court to sell the property of the bankrupt free and clear of all liens or of any specific lien, or which requires the court to sell the property of the bankrupt subject to all liens, or to any specific lien." (Page 25)

The equity jurisdiction is conferred by Sect. 2, Title 11, U. S. C., of Bankruptcy Act, wherein the courts are invested with such jurisdiction at law or *in equity* as will enable them to:

> (7) "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided."
>
> (15) "make such orders, issue such process, and enter such judgments in addition to those specifically provided for *as may be necessary for the enforcement of the provisions of this title.*"

The equity powers of the Bankruptcy Courts to *make orders, issue process* and *enter judgments* are only such *as may be necessary* for the enforcement *of the provisions of* the act.

The Bankruptcy Court is a court of limited jurisdiction, (see cases cited pages 6 and 7, Brief of Respondent Opposing Petition for Writ of Certiorari), and if it is a court of limited jurisdiction, i.e., limited by the act of Congress, its authority ought not be extended by judicial construction. In other words, it ought not to be allowed to do under guise of a full fledged court of equity, that which it is unable to do because of lack of authority or jurisdiction granted by Congress. It cannot make itself a court of general equity jurisdiction, when the act creating it limits its powers to those necessary for the enforcement only *of the provisions* of the act itself.

As previously stated, the Bankruptcy Act in all its provisions assumes to protect the taxes due the sovereign states. In fact these taxes are not affected by the bankruptcy proceedings, because not affected by a discharge in bankruptcy, (§35). The Act further provides that the Trustee shall *pay taxes*, and provides that the court can determine only the amount or the legality thereof when that matter is drawn in question. (§104a)

Taxes are not ordinary debts, and have never been treated as such in the Bankruptcy Court:

U. S. vs. Herron, 87 U. S., 251; 22 Law. Ed., 275;
Osterberg vs. Union Trust Co., 93 U. S., 424, 23 Law. Ed., 964;
Merriweather vs. Garrett, 102 U. S., 472; 26 Law. Ed., 197;
In re Brezin, 297 Fed., 300, 3 Syl.

Since the "provisions" of the act give the court authority only to *protect* the State's right to its taxes, under what method of reasoning can it be claimed that "equity" powers are necessary to *destroy* them? There being no power in the Act to discharge the bankrupt, or his property from tax claims, there is no *provision of this title* for *the enforcement* of which such equity jurisdiction *may be necessary.*

We think the proposition is elementary, that jurisdiction must be expressly granted. In the absence of an express grant of such power in the Act, jurisdiction to interfere with the lien of the State for taxes is withheld.

B. Petitioner's Brief is made up of *dicta* from many cases. Some of these refer to the general jurisdiction of the bankruptcy court, and have neither considered nor made mention of the specific application of the bankruptcy law to the question of taxes. Those cases which make reference to taxes, generally fall into the following classifications, which account for the assumption of authority by the Court in these matters:

(1) Where the "amount or legality" of taxes have been questioned:

In re General Film Corporation, 274 Fed. 903;
In re Anderson, 279 Fed., 525;
In re Stavin, 12 Fed. 2nd, 471;
In re Sheinman, 14 Fed. 2nd, 323;
In re Florence Commercial Co., 19 Fed. 2nd, 468.

(2) Where the property was already "*in custodia legis*", and some other court sought to interfere:

Ex Parte Tyler, 149 U. S., 164, 37 Law. Ed. 689;
Murphy vs. John Hoffman Co., 211 U. S., 562; 53 Law. Ed., 327;

Dayton vs. Standard, 241 U. S. 588, 60 Law. Ed., 1190 (Taxes were paid);

Supply Co. vs. Dattle, 44 Fed. 2nd, 159.

(3) Where no lien for taxes is claimed, or is provided by State law:

In re Prince & Waller, 131 Fed., 546, (The state law did not take effect until after the mortgage lien was acquired);

In re Anderson (*supra*);

United States vs. Wood, 290 Fed., 109, (Distinguishes between taxes and other debts due U. S.);

City of Chelsea vs. Dolan, 24 Fed. 2nd, 522;

In re Alamac Operating Corporation, 42 Fed. 2nd, 120.

(4) In many cases the bankruptcy court has assumed to sell the property "free and clear" of encumbrances, and has paid the taxes from the fund created from the sale. Of course, as long as the taxes are paid the State is satisfied, and no question has ever arisen, except between the court and the purchaser as to the application of proceeds held by the court:

In re Kellar, 6 A. B. R., 351; 109 Fed., 131;

In re Reading Hat Mfg. Co., 224 Fed., 786;

Dayton vs. Standard, 241 U. S., 588 (Taxes paid).

While there are statements in some of the above mentioned cases which, when taken alone, appear to question the impregnability of the State's lien for taxes, yet in every case there has existed a fund from which taxes were eventually paid and nowhere has the State been forced to defend its tax lien.

C. On the contrary there are numerous cases which have recognized the power of the State to create tax liens and appear to recognize the inability of the Bankruptcy Court to interfere therewith.

In *Marshall vs. New York*, 254 U. S., 380; 65 Law. Ed., 315, the right of the State to create a tax lien paramount to all other liens is recognized, and the rule adopted, that "the decisions of the highest court of the state as to the existence of the right and its incidents will be accepted by this court as conclusive."

Ex parte Tyler, 149 U. S., 164; 37 Law. Ed., 689, at p. 697:

> "The Courts of the United States have always recognized the importance of leaving the powers of the State in respect to taxation unimpaired. Where the question involved arises under the State Constitution and laws, the decisions of its highest tribunal are accepted as controlling."

(Ohio law and cases are set forth in Respondent's Brief Opposing Writ of Certiorari, pp. 9-11.)

In re Kellar, 6 A. B. R., 351; 109 Fed. 131:

Sale by bankruptcy court "free and clear from all liens" does not affect the statutory lien for taxes.

In re Brinker, 128 Fed., 634:

Sale for less than mortgage,—taxes need not be paid for "the municipalities to whom the taxes are due being secured, in any case, by their lien on the property."

Delahunt vs. Oklahoma Co., 226 Fed., 31:

Lien for taxes attaches to the *res*, without regard to individual ownership. Mortgagor purchasing at sale "free and clear," could not defeat state's lien

Britton vs. Iowa Co., 9 Fed., 2nd, 488:

> Recognizes that a lien created by state law and not provable under Sect. 63 is not affected nor destroyed by bankruptcy proceedings.

From these cases, and from the trend of the opinions in others, it seems that the courts have always recognized the sovereign character of the tax liens of the State:

United States vs. Herron, supra;
Woodyard vs. Sayre, 110 S. E., 689; 24 A. L. R., 1497.

D. As a conclusion, no doubt the Bankruptcy Court in the administration of the funds coming into its control may demand statements of taxes and if the proper tax officers fail to send in such statements, may pay out funds without regard to taxes; the court may determine the amount and validity of any tax claim; the Court may pay taxes from funds in its possession, and thus convey to purchasers at its sales property free and clear of incumbrances;

BUT any order removing or affecting the lien of the State for taxes is ineffectual unless the taxes are actually *paid*.

WHEREFORE, Respondent respectfully submits:

(1) That the Bankruptcy Court never acquired jurisdiction of the person of the Treasurer of Trumbull County, so as to make any order binding either upon him or upon the State of Ohio, which he represented;

(2) That under the circumstances of this case the petitioner is not an innocent purchaser, and is not equitably entitled to relief; and

(3) That the Bankruptcy Court had no jurisdiction to interfere with the lien of the State of Ohio for taxes.

And for these reasons the decisions of the Court of Appeals and the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

G. H. BIRRELL,
Prosecuting Attorney,
Trumbull County, Ohio,

GEO. W. SECREST,
Assistant Prosecuting Attorney,
Trumbull County, Ohio,

GILBERT BETTMAN,
Attorney General,
State of Ohio,
Attorneys for Respondent.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 55

I. J. VAN HUFFEL, PETITIONER,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED APRIL 24, 1931

CERTIORARI GRANTED MAY 25, 1931

(35,829)

(35,829)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 55

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 22, 1931

No. 28,887.

In the Court of Common Pleas

OF TRUMBULL COUNTY, OHIO.

I. J. VAN HUFFEL,
Warren, Ohio,
Plaintiff,

vs.

FRANK F. MUSSER, Treasurer,
Trumbull County, Warren, Ohio,
Defendant.

PETITION TO QUIET TITLE AND FOR EQUITABLE RELIEF.

(Filed in Common Pleas Court, March 23, 1929.)

Comes now I. J. Van Huffel, plaintiff, and says that Frank F. Musser is the duly elected, qualified and acting treasurer of Trumbull County, Ohio, and as such is by law charged with the duty of collecting taxes lawfully assessed and appearing upon the tax duplicates of said Trumbull County.

Plaintiff further says that he is the owner of and in possession of the following described real estate, to-wit:

PARCEL No. 1:

Situated in the Township of Howland in the County of Trumbull and State of Ohio, and known as being part of Section 11 of said Township and bounded and described as follows:

Beginning at a stake in the center of Dietz Road, said stake being 283.36 feet from a stone on the center line of said road and Perkins road; thence N. 87° 46′ W. along center line of said road 691.64 feet to a stake; thence S. 2° 14′ W. 30 feet to an iron pin, said iron pin being in the south line of said road; thence continuing S. 2° 14′ W. 311.58 feet to an iron pin; thence continuing along same line 341.58 feet to an iron pin; thence S. 87° 46′ E. 514.79 feet to an iron

pin, said iron pin being on the westerly right of way line of the Erie R. R. Main Line Division; thence N. 43° 02′ E. along said right of way line 352.59 feet to an iron pin; thence S. 87° 23′ W. 53.3 feet to an iron pin; said line being the southerly boundary of the United Concrete Brick Co.; thence N. 2° 12′ E. 385.8 feet along the westerly boundary of the United Concrete Brick Co., to an iron pin, said iron pin being on the south line of Dietz Road; thence continuing along said line 30 feet to a stake and the place of beginning, containing 10.48 acres more or less. Being the same land conveyed by The Board of Trade of the City of Warren to The Supreme Motors Corporation Company October 2nd, 1918, and recorded in Volume 248, page 424 Trumbull County Records of Deeds.

PARCEL No. 2:

Situated in the Township of Howland, County of Trumbull and State of Ohio and known as being part of the original survey of lot Eleven (11) Howland Township and further described as follows:

Beginning at the iron pin at the northwest corner of the lands of The American Welding and Manufacturing Company, at the easterly line of the right of way of the Pennsylvania Railroad; thence north 16° 38′ W. along line of said right of way, a distance of 360.98 feet to an iron pin in the center of a 60 foot east and west road, thence south 87° 46′ E. along the center of said road a distance of 1450.10 feet to the northwest corner of other lands formerly owned by The Supreme Motors Corporation, thence S. 2° 14′ W. a distance of 341.58 feet to an iron pin at the northeast corner of lands owned by The American Welding and Manufacturing Company, thence N. 87° 46′ W. along the north line of lands of The American Welding and Manufacturing Company a distance of 1333.61 feet to the place of beginning, containing 10.92 acres; excepting therefrom a strip 30 feet wide for highway and railroad switches along the westerly side, paralled with the easterly line of the Pennsylvania Railroad right of way.

Being the same land conveyed by The Board of Trade of the City of Warren, Ohio, to The Supreme Motors Corporation Company September 20th, 1919, and recorded in Volume 256, page 184, Trumbull County Records of Deeds.

Plaintiff further says that the defendant, Frank F. Musser, as treasurer of Trumbull County, Ohio, claims an estate or interest therein by way of taxes shown on the tax duplicate or a tax lien or liens arising therefrom, adverse to the plaintiff's right and title, but which estate, interest or liens, plaintiff says, are of no force and effect and are clouds on the title of the property of plaintiff above described.

WHEREFORE, plaintiff prays that defendant may be compelled to show his said estate, interest, taxes or liens, and that the same may be adjudged to be null and void and plaintiff's title quieted against the same, and for all proper relief in the premises.

FILLIUS & FILLIUS AND
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
by ALONZO M. SNYDER,
Attorneys for Plaintiff.

(Duly Verified.)

Praecipe for summons, summons issued pursuant thereto and the return of summons are omitted in printing.

Demurrer to petition filed by defendant March 28, 1929, and the order of the court under date of May 17, 1929, overruling the same, are omitted in printing.

ANSWER.

(Filed in Common Pleas Court June 15, 1929.)

Now comes Frank F. Musser, and admits that he is the duly elected, qualified and acting Treasurer of Trumbull County, Ohio; and that he is as such charged by law with the duty of collecting taxes lawfully assessed, and appearing upon the tax duplicates of Trumbull County.

Answering further, defendant says that his records disclose the following unpaid taxes, together with penalty, interest and fees upon the premises described in plaintiff's petition, to-wit:

1924	Acres	1st Half	Penalty	Interest	Last Half	Penalty	Interest
$1.18	10.48	$667.35	$66.74		$667.35	$66.74	
	10.92	46.43	4.64		46.43	4.64	
1925							
$1.28	10.48	733.50	73.35		733.50	73.35	123.30
	10.92	50.37	5.03		50.37	5.03	84.97
1926							
$1.44	10.48	863.42	86.34	303.92	863.42	86.34	265.93
	10.92	39.31	3.93	13.84	39.31	3.93	12.11
1927							
$1.58	10.48	947.37	94.74	250.11	947.37	94.74	208.42
	10.92	43.14	4.31	11.39	43.14	4.31	9.49
1928							
$1.52	10.48	911.39	91.14	160.40	911.39	91.14	120.30
	10.92	41.50	4.15	7.30	41.50	4.15	5.48
1929							
$1.60	10.48	959.36	95.94	84.42	959.36		38.37
	10.92	43.68	4.37	3.84	43.68		1.74
Building omitted from duplicate in 1924		17.70					

Total tax	$10,711.34
Total penalty	969.05
Total interest	2,819.33
Adv. and Aud. fees	1.70
Total	$14,501.42

Defendant further says that said taxes are due and unpaid; and that the same are in full force and effect, and a first and best lien against the premises described in plaintiff's petition.

Answering further defendant denies each and every allegation contained in said petition, except such as are herein specifically admitted to be true.

WHEREFORE, Defendant having answered prays the Court that the lien of the State, for taxes against said premises, be protected; that said taxes be declared a first and best lien against said premises; and for such other relief as is just and equitable.

GEO. W. SECREST,
Attorney for Defendant.

(Duly Verified.)

REPLY.

(Filed in Common Pleas Court July 25, 1929.)

Now comes plaintiff by leave of court first had and obtained, and for reply to defendant's answer denies that the taxes alleged therein are in full force and effect, except the taxes of 1928 as hereinafter set forth; denies that they constitute a first and best lien against the premises described in plaintiff's petition and further denies each and every allegation in said answer contained which are not admissions to allegations in plaintiff's petition.

Further replying, plaintiff says that on or about the 24th day of April, A. D. 1928, H. B. Doyle, the duly appointed, qualified and acting Trustee in Bankruptcy of The Sterling Knight Company, which company was then the owner of the property described in plaintiff's petition, filed his certain petition in the United States District Court for the Northern District of Ohio, Eastern Division, to marshal liens and sell real estate, making the following parties defendants therein, to-wit: The Sherwin-Williams Co., The Old Dominion Mortgage Co., The Union Trust Company, Trustee, The Michigan Lubricator Company, The Class Journal Co., The General Aluminum & Brass Manufacturing Co., C. F. Routzahn, Collector of Internal Revenue, State Tax Commission of Ohio, Department of Industrial Relations and the Industrial Commission of Ohio, Western Reserve National Bank, Joseph Hughes, Clerk of Courts, Ohio Public Service Co. and Frank F. Musser, County Treasurer, the defendant herein, praying that an order be granted marshalling the liens upon and interests in said property, determining the validity, amount and priority thereof, ordering its sale at public auction or private sale, as the court might direct, free and clear from all encumbrances and interests, and transferring the rights of the parties to the fund derived from said sale, and further prayed for an order to show cause upon the parties defendant therein, requiring them to set up their rights or be forever barred from asserting the same, and for such other and further relief as in equity was just.

Answers and/or cross petitions were filed on behalf of defendants The Old Dominion Mortgage Co., The Union Trust Company, Trustee, The General Brass Co., The Second National Bank of Warren, Bert Buckley, Treasurer of the State of Ohio, C. F. Routzahn, Collector of Internal Revenue, and Frank F. Musser, Treasurer

of Trumbull County, Ohio, the other defendants being in default for answer or demurrer.

That defendant, Frank F. Musser, County Treasurer, in his answer therein set up all taxes, penalties and interest which had accrued for the years 1924, 1925, 1926 and 1927 respectively, aggregating $9,717.25.

That said court having jurisdiction of the subject matter and all the parties, thereafter on or about June 26, 1928, upon hearing made certain findings and rendered judgment as per Journal Entry duly recorded in the Records of the United States District Court, Northern District of Ohio, Eastern Division, and also recorded as instrument No. 151,979 in the Recorder's Office of Trumbull County, Ohio, a copy of which Journal Entry is hereto attached, marked Exhibit "A" and made a part hereof as if fully rewritten herein.

That said judgment and decree has fully adjudicated the right of defendant Frank F. Musser as County Treasurer in and to the premises herein involved with reference to said taxes set up in his answer filed herein, and that said judgment and decree is still in full force and effect, never having been vacated, modified or reversed, and that thereby this court has no jurisdiction to reconsider or further adjudicate the rights of defendant Frank F. Musser as Treasurer of Trumbull County, Ohio, for taxes against the premises involved in the within suit.

Plaintiff further says that under said decree as aforesaid, H. B. Doyle, Trustee in Bankruptcy, sold said premises free and clear from all liens, claims, incumbrances, including taxes above described, and all rights of all the parties to said suit, to The Union Trust Company, Trustee, for $75,000.00; and that thereafter this plaintiff through divers conveyances became the bona fide purchaser thereof for good and valuable considerations, taking title subject only to taxes for the year 1928 and thereafter.

Plaintiff further says that within the time allowed for the payment of taxes, plaintiff tendered to defendant Frank F. Musser, Treasurer of Trumbull County, Ohio, the sum of $952.89 in full payment of taxes for the first half of 1928, which tender was refused by defendant; that said plaintiff on or before the time for payment of the taxes for the last half of 1928, made a similar tender of $1905.78 for the full year 1928, which tender was also refused and made a similar tender of the first half of the

taxes for the year 1929 and all of the year 1928, which was refused.

Plaintiff further says that he is and has been at all times ready, willing and able to pay the taxes for the year 1928, and of 1929 which have accrued, but that defendant wrongfully and illegally refuses to accept the same.

WHEREFORE plaintiff having fully replied prays that defendant's answer be dismissed, that plaintiff be granted the relief prayed for in his petition, that his rights be fully protected in connection with the tender made for the payment of taxes for the year 1928, and that he be granted such other and further relief as he may be entitled to in law or in equity.

FILLIUS & FILLIUS and
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
Attorneys for Plaintiff.

(Duly verified.)

EXHIBIT "A."

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

IN THE MATTER OF
THE STERLING KNIGHT CO.,
BANKRUPT.

In Bcy. #12838.

H. B. DOYLE, TRUSTEE,
Plaintiff,
vs.
THE SHERWIN-WILLIAMS COMPANY, *et al.,*
Defendants.

ORDER MARSHALLING LIENS AND SALE OF REAL ESTATE AT PUBLIC OR PRIVATE SALE.

This day this cause came on for hearing on the Trustee's Petition to Marshal Liens and Sell Real Estate and the Answers and Cross Petitions of the Sherwin-Williams

Company, The Old Dominion Mortgage Company, The Union Trust Company, Trustee, The Michigan Lubricator Company and The General Brass Company, C. F. Routzahn, Collector of Internal Revenue for United States, Second National Bank of Warren, Frank F. Musser, County Treasurer, Trumbull County, and the Answers of the Trustee to the various Cross Petitions.

The court after hearing the evidence and having carefully examined the proceedings and being fully advised in the premises finds that The Union Trust Company, Trustee, has a good, valid and subsisting lien on the real estate described in its mortgage, and that the same is a first lien upon said property in the sum of $231,000. That The Old Dominion Mortgage Company has a good, valid and subsisting lien upon the property described in its mortgage, and that the same is a second lien upon said property in the sum of $18,999.00.

That the claim of The Old Dominion Mortgage Company and the claim of The Second National Bank of Warren, Ohio, arise out of the same transaction and exist by virtue of the notes and mortgage executed by The Old Dominion Mortgage Company and to which The Second National Bank claimed to have some rights and their claims are identical, and inasmuch as the mortgage is recorded in the name of The Old Dominion Mortgage Company this order will decree the lien to be in The Old Dominion Mortgage Company.

That C. F. Routzahn, Collector of Internal Revenue for United States has a good, valid and subsisting lien upon the real estate described in Trustee's Petition to Marshal Liens in the sum of $17,266.00. That the State Tax Commission of Ohio has a good and valid lien on the property described in Trustee's Petition in the sum of $6,037.50. That Frank F. Musser, Treasurer of Trumbull County, has a good and valid lien upon the property described in said Trustee's Petition in the amount of $9,717.25.

That the said liens of the United States government, the State of Ohio and Trumbull County are of equal priority and are the third lien upon the property described in Trustee's Petition.

That The Sherwin-Williams Company have a good and valid lien upon said real estate described in Trustee's Petition in the sum of $156.40, and that the same is fourth in order of priority.

That the Second National Bank claim being identical with The Old Dominion Mortgage Company claim and The Old Dominion Mortgage Company claim being a matter of record and the court having found that The Old Dominion Mortgage Company has a lien by virtue of said claim, The Second National Bank is found to have no lien.

That The Class Journal Company being in default for pleading is found to have no lien against the premises described in Trustee's Petition. That The General Aluminum & Brass Manufacturing Company claiming a lien by virtue of a judgment secured on March 14, 1927, being after the filing of the bankruptcy petition, is found to have no lien. That The Michigan Lubricator Company claiming a lien by virtue of a judgment secured on April 13, 1927, said judgment being secured after the filing of the petition in bankruptcy, is found to be no lien upon the premises described herein.

That the rights and priority of the lienors as hereinbefore stated be and they hereby are transferred to the fund derived from the sale of said property, and the Trustee is hereby authorized and directed to offer said property at public auction on the premises on the 10th day of July, A. D. 1928, beginning at two o'clock in the afternoon and to make due return of his proceedings under this order.

PAUL E. CARSON,
Referee.

Demurrer to reply filed September 3, 1929, and order of the court under date of October 5, 1929, overruling the same, are omitted in printing.

The agreed statement of facts filed February 24, 1930, is omitted in printing as the Court of Appeals made a finding of fact which is printed *infra*, Page 19.

DECREE AND JUDGMENT OF THE COMMON PLEAS COURT.

(Filed March 28, 1930.)

Journal 84, Page 311.

March 28, 1930.

This cause came on for hearing before the Court upon the petition of plaintiff, the answer of the defendant, the reply, the agreed statement of facts of the parties duly submitted and the arguments and brief of counsel, and upon consideration whereof the Court finds that at the time of the institution of this action the plaintiff I. J. Van Huffel was and still is the owner of and in possession of real estate described in the petition; that the defendant Trace D. Harkelrode is the duly elected, qualified and acting treasurer of Trumbull County, Ohio, having succeeded defendant Frank F. Musser in such office, and that the former defendant Musser, who was the duly elected, qualified and acting treasurer of this county, was such treasurer at the institution of this action and during the time of the bankruptcy proceedings hereinafter referred to; that the plaintiff herein derives his title to the real estate in the petition described mediately from H. B. Doyle as trustee in bankruptcy of The Sterling-Knight Company, and that at the time of the institution of the bankruptcy proceedings referred to The Sterling-Knight Company was the owner in fee simple and in possession of said real estate; that notice of the pendency of the bankruptcy proceedings against The Sterling-Knight Company was given to the defendant Frank F. Musser, County Treasurer, prior to the time of final hearing in said matter and that the said Frank F. Musser mailed to Paul E. Carson, Referee in Bankruptcy, a statement of taxes due on said real estate at the time; that notice of the sale of the property herein was duly received by said Frank F. Musser as County Treasurer, and no further answer or cross petition was filed in said cause on behalf of said treasurer, nor was he represented by counsel nor was he himself present at any of the hearings; that said bankrupt estate has been fully adminstered and closed and that no proceedings for review or appeal were filed within the time limit therefor in said bankruptcy proceedings, being Cause No. 12838 on the Bankrupt Docket of the District Court of the United States for the Northern District of Ohio, Eastern Division; that the county taxes of Trumbull County,

Ohio, for the years 1924, 1925, 1926 and 1927 were charged on the tax duplicate of said county and effective at the time of the bankruptcy proceedings herein referred to and that the penalties and interest thereon for such years have been added to the amount since the institution of such proceedings by reason of the non-payment of the amounts listed as such taxes; that the amount of taxes for the years 1924 and 1925 were certified delinquent in February 1926; that none of the amounts listed in defendant's Exhibit A as taxes, penalties and interest have been paid; that in January 1929 and before the final due date thereof the plaintiff tendered to Frank F. Musser as County Treasurer the sum of $952.89 in payment of taxes for the first half of the year 1928 against the real estate described in the petition. On July 20, 1929 and before the final due date thereof the plaintiff duly tendered to defendant Frank F. Musser the sum of $1905.78 in payment of taxes for the full year 1928 against the real estate in the petition described, and on January 20, 1930 the plaintiff duly tendered to the defendant Trace D. Harkelrode, County Treasurer, the sum of $3172.47 in full payment of the taxes against the real estate described in the petition for the full year 1928 and for the full year 1929 upon a reduced valuation of $79,168.00 for such real estate, as claimed by the plaintiff to be the true value thereof in money in a complaint theretofore filed by the plaintiff with the Auditor of Trumbull County, Ohio, in accordance with the provision of law for the contest of assessed values for tax purposes; that each of such tenders was refused for the stated reason that previous taxes as listed had not been paid.

The Court finds that the allegations of the petition are true and that the plaintiff herein is the owner in fee simple of the property in the petition described and that his title thereto should be and hereby is quieted as against the pretended claim of the Treasurer of Trumbull County, Ohio, for the taxes and penalties thereon for the years 1924, 1925 and 1926 and 1927 and the said taxes and penalties are hereby ordered cancelled and discharged; that the taxes for the year 1928 in the sum of $1905.78 without penalties or interest, are a lien upon said real estate; that the taxes for the year 1929, as yet undetermined and which cannot be determined until the complaint filed by the plaintiff with the Auditor of Trumbull County for contest of assessed valuation for tax purposes is determined, are a lien upon said real estate; that upon the payment by the plaintiff to the defendant

Harkelrode as Treasurer of taxes for the year 1928 without penalty or interest, $1905.78 and the payment of taxes to the defendant Harkelrode on said property for the year 1929 as heretofore tendered to defendant Harkelrode, Treasurer, by plaintiff without penalty or interest, shall fully release said property from all liens now held by the said defendant Harkelrode as Treasurer against said property for taxes of any and all kinds and descriptions as shown upon the tax duplicate of said Trumbull County, Ohio, except such further amount of taxes for the year 1929, if any, as may be found to be due thereon on the final determination of the complaint filed by plaintiff with the Auditor of Trumbull County, Ohio, for contest of assessed valuation for tax purposes on said property for that year. And thereupon the title to said property shall be fully quieted in plaintiff without lien or claim of any kind thereon by any person defendant to this action except as herein noted.

It is further Ordered that the defendant Harkelrode as Treasurer of Trumbull County, Ohio shall strike off from the tax lists as held by him the taxes and penalties upon said property for the years 1924, 1925, 1926 and 1927 and mark them cancelled and discharged and the Auditor of Trumbull County, Ohio, is hereby ordered to strike from the tax duplicate of Trumbull County, Ohio, the taxes and penalties appearing upon said books on said property for the years 1924, 1925, 1926 and 1927 and to mark the same cancelled and discharged by order of Court.

It is further Ordered that the Clerk of Courts transmit to both the Treasurer and Auditor of Trumbull County, Ohio, a certified copy of this Journal Entry.

Plaintiff to pay costs. Defendant excepts.

NOTICE OF APPEAL.

(Filed in Common Pleas Court, April 7, 1930.)

Notice is Hereby Given That the defendant, Trace D. Harkelrode, has appealed the finding of the Court of Common Pleas in this cause to the Court of Appeals of this County.

G. H. Berrell and Geo. W. Secrest,
Attorneys for Defendant.

April 3rd, 1930.

We, being attorneys of record for the Plaintiff, I. J. VanHuffel, hereby acknowledge receipt of the foregoing notice of appeal.

FILLIUS & FILLIUS,
Attorneys for Plaintiff.

OPINION OF THE COURT OF APPEALS.

(Filed June 4, 1930.)

POLLOCK, *J.*:

This action comes into this Court on appeal, and was submitted on the pleadings and an agreed statement of facts.

The plaintiff in this action is seeking to have his title quieted to the real estate described in the petition against taxes claimed by the defendant Treasurer to be due Trumbull County for the years 1924, 1925, 1926 and 1927, amounting to $9717.25.

An answer was filed by the Treasurer claiming that the taxes which the plaintiff seeks to have his title quieted against were taxes accruing and unpaid for the years above mentioned.

We learn from the pleadings and the agreed statement of facts that The Sterling-Knight Company was adjudged a bankrupt on May 13, 1927, and that the real estate described in the petition was a part of the bankrupt's estate at the time of the adjudication in bankruptcy. Afterwards, on October 28, 1927, at an election held before Paul E. Carson, Referee in Bankruptcy, H. B. Doyle was elected trustee of said estate, and gave bond and qualified.

On March the 28th, 1928, the trustee in bankruptcy filed a petition in bankruptcy, making the lien-holders, including the then Treasurer of Trumbull County, parties in said action, describing said real estate, asking that an order may be granted marshalling the liens upon said property, determining the validity and priority thereof, and further asking for an order of sale of said real estate either at public or private sale, free and clear of all incumbrances and interest, and transferring the rights of the parties to the fund derived from said sale.

The real estate described in this petition is the same real estate now owned by the plaintiff in this action, and for which he is asking that his title be quieted.

On the filing of this application, the Referee in Bankruptcy issued his notice of the filing and the purpose thereof to all creditors of said bankrupt, and also a further notice of the time of the hearing of the application, which notices were served upon the defendant Treasurer of Trumbull County.

The Treasurer of Trumbull County, before the time set for the hearing, filed with the Referee in Bankruptcy, a statement of the taxes then accrued on the property and unpaid, being for the beforementioned taxes. The Treasurer did not otherwise appear in the bankruptcy proceedings.

After the hearing, the Referee in Bankruptcy marshalled the liens on this real estate, finding that The Union Trust Company, as Trustee, had the first lien thereon in the sum of $231,000.00; that the Old Dominion Mortgage was the second lien thereon in the sum of $18,999.00, and that the claims of the United States Government, the State of Ohio and Trumbull County are of equal priority and have the third lien upon the property described. The Referee further ordered that the rights and priority of the lien-holders be transferred to the fund derived from the sale of the property, and that the Trustee is authorized and directed to offer said property for sale at public auction. There was also a supplemental order issued that the purchaser may use and apply towards the payment of the purchase price for said real estate any of the bonds secured by the first mortgage indenture between The Sterling-Knight Company and The Union Trust Company, Trustee.

Afterwards the Trustee in Bankruptcy returned the order of sale that he had sold the property to The Union Trust Company, Trustee, for $75,000.00 and that the Trust Company had tendered in payment the bonds of the Sterling-Knight Company in the amount of $200,000.00, in payment of the purchase money of the above described property.

Afterwards, the Trustee was ordered to convey this property to The Union Trust Company in obedience to the former order of sale, which was done, and the plaintiff's title to the property comes through conveyances from The Union Trust Company. The Union Trust Company did not pay the purchase price bid for the property except by the surrender and cancellation of said bonds.

The taxes due Trumbull County for the years involved in this action was not paid by the Trustee in Bank-

ruptcy, or in any way cancelled, except by the finding of the Referee in Bankruptcy that these taxes were a third lien upon the real estate on which they were assessed. The Trustee received from the sale of other property of the bankrupt estate sufficient money to more than pay the taxes due on the real estate.

We then come to the question whether this order in the bankruptcy proceeding is a valid and binding disposition of the taxes on this property, and that the property, upon which it accrued, is relieved of the burden of the payment of taxes or whether the order and finding in the bankruptcy proceeding is void.

The first question to be determined is whether the judgment of the bankruptcy proceeding can be questioned in a collateral proceeding.

> "Although a court may possess jurisdiction of a cause of the subject matter and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judiciously in all things, and cannot then transcend the power conferred by law."
>
> *Windsor v. McVeigh*, 93 U. S. 274-282, 23 L. Ed. 917.

When a court has jurisdiction, whether its decision is correct or otherwise, the judgment is binding on every other court, "but if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." *Elliot v. Piersol*, First Peters, 328-340. To the same effect is *Freeman on Judgments*, Section 117, and *Black on Judgments*, Section 170.

A bankruptcy court has only such powers and jurisdictions as is conferred by statute, or such as are necessarily implied from such statutes.

> "Bankruptcy Courts, like all other national courts, although not courts of inferior jurisdiction, are courts of limited jurisdiction. They are creatures of the statute, and possess no powers except those conferred upon them either expressly or by necessary implication."
>
> *In re Williams*, 120 Federal, 38;
>
> *Wilson v. U. S.*, 228 Federal, 344-351.

Section 64-a of the Bankruptcy Law reads as follows:

> "Debts which have priority—The Court shall order the trustee to pay all taxes legally due and

owing by the bankrupt to the United States, State, County, District, or Municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the Court."

The power of the state to levy and collect taxes and also the procedure of collecting are inherent in the State.

Western Union Telegraph Company v. Mayer, 28 O. S. 521-533;

City of Cleveland v. Edwards, 109 O. S. 598.

"In the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power."

Union Pacific R. R. Co. v. Peniston, 18 Wall. 530 (21 L. Ed. 791).

"The right to levy and collect taxes has always been recognized as one of the supreme powers of the state, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, keeping within those which do not impair the constitutional rights of the citizen."

Leigh v. Green, 193 U. S. 79-87 (48 L. Ed. 626).

The only power or jurisdiction that the bankruptcy court has over state taxes is contained in the provisions of Section 64-a, *supra*. That section directs that the Referee shall order the Trustee to pay all the taxes due a state or county before he pays the creditors. The only further duty that the court has if there is a question as to the amount or legality of such taxes, to hear and determine these questions.

"A lien for taxes does not, however, stand upon the footing of an ordinary encumbrance, and is not displaced by a sale under a pre-existing judgment or

decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale, pursuant to the statute prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title."

Lake Superior R. R. Co. v. United States, 93 U. S. 424 (23 L. Ed. 965).

"The requirement of the present law is a wide departure from the Act of 1867, and specifically obliges the Trustee to pay all taxes legally due and owing without distinction between United States and the State, County, District, or municipality."

New Jersey v. Anderson, 203 U. S. 483-489 (51 L. Ed. 297).

"The bankruptcy act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546."

In re Anderson, 279 Fed. 525-529.

Section 5671 of the General Code of this State reads as follows, so far as we need refer to it:

"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid."

Under this provision of the Code, when taxes accrue against real estate, they become a lien upon the real estate until paid.

"By virtue of the above section, the lien of the state for taxes is paramount to all other liens."

Trust Company v. Root, 72 O. S. 535.

"Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of

the state), is sold to the mortgageee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured."

In re Veitch, et al., 101 Fed. 251.

We think that it appears from the authorities referred to that the bankruptcy court had no power or jurisdiction to relieve the real estate belonging to the bankruptcy estate from the taxes then accrued and due Trumbull County by any order that it could make except by ordering the Trustee to pay the taxes, and that the taxes for the years referred to are yet a lien on the real estate and the Treasurer of Trumbull County has a right to collect such taxes from the real estate in any way authorized by the laws of this State.

It follows that judgment must be entered for the defendant, and plaintiff's petition dismissed. Exceptions noted.

If a motion for a new trial is filed, it is overruled, and exceptions noted.

Farr, and Roberts, *JJ.*, concur in the judgment.

MOTION FOR NEW TRIAL.

(Filed in the Court of Appeals June 7, 1930.)

Plaintiff moves the court for a new trial on the grounds that the decision and judgment of the Court herein are contrary to law and are against the weight of the evidence.

A. M. Snyder,
Attorney for Plaintiff.

SUPPLEMENTAL REPLY.

(Filed in Court of Appeals Sept. 17, 1930.)

Now comes the plaintiff and by leave of court first had and obtained to file this his supplemental reply says:

That notwithstanding the fact that the trustee in bankruptcy had in his hands funds derived from sources other than the sale of mortgaged property out of which, under the bankruptcy laws, the whole or a part of the taxes now claimed by the defendant might and should have been first paid, the defendant and his predecessor in office made no application to the bankruptcy court to have the taxes now claimed to be due him for the years 1924, 1925, 1926 and 1927 paid from such funds.

WHEREFORE plaintiff prays as in his petition.

SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
FILLIUS & FILLIUS,
Attorneys for Plaintiff.

(Duly verified)

DECREE AND JUDGMENT OF THE COURT OF APPEALS.

(Entered Sept. 17, 1930.)

Journal 2, p. 201, Sept. 17, 1930.

And now this cause came on to be heard upon the appeal of the defendant from the judgment of the Common Pleas Court of Trumbull County, Ohio, and upon consideration of the petition, answer, reply, the agreed statement of facts, the arguments and briefs of counsel, the court finds that:

FINDINGS OF FACT.

1. On and for some time prior to the 13th day of May, 1927 The Sterling-Knight Company was the owner and was in possession of the real estate described in plaintiff's petition, and on said day The Sterling-Knight Company was by the United States District Court for the Northern District of Ohio, Eastern Division, duly adjudged a bankrupt, Bankruptcy Cause No. 12838, and the administration of its estate referred to Paul E. Carson, the duly appointed, qualified and acting Referee in Bankruptcy at Youngstown, Ohio.

2. On the 28th day of October, 1927, at a meeting duly held for such purpose, H. B. Doyle of Youngstown, Ohio, was duly elected Trustee of the bankrupt estate, and he qualified as such by giving bond in the sum of $30,000 with the United States Fidelity & Guaranty Company as surety, for the faithful performance of his official duties as such Trustee, which bond was accepted and approved by the Referee.

3. On the 24th day of April, 1928, the Trustee filed his petition with the Referee for an order to marshal the liens upon and to sell the property of the bankrupt, including the real estate described in plaintiff's petition herein, and for the transfer of all liens thereon to the fund to be derived from the sale thereof, making as parties defendant to such petition all those who claimed any lien upon such property, including the property described in plaintiff's petition herein, which parties included among others Frank F. Musser, the then duly elected, qualified and acting Treasurer of Trumbull County, Ohio, the State Tax Commission of Ohio, and C. F. Routzahn, the Collector of Internal Revenue for the Eighteenth Collection District of Ohio.

4. Upon the filing of such petition the Referee, in the manner and form as provided by the Bankruptcy Laws of the United States mailed to all known creditors of the bankrupt, including the Treasurer of Trumbull County, Ohio, the following notice:

"In Bankruptcy

In the Matter of The Sterling Knight Company, Bankrupt.	Notice of Application for Leave to Sell Assets and Marshal Liens.

To all Creditors of said Bankrupt:

Take notice that the trustee herein has filed his application for leave to sell at public or private sale free and clear of all incumbrances real estate, buildings and building equipment. Property located at Howland Twp. at City of Warren limits, containing 21 acres. For better description see Trustee's Petition to sell.

Belonging to the above estate, and that said application will be for hearing before the undersigned

Referee in Bankruptcy at his offices 310-11-12 Home Savings & Loan Building, in the City of Youngstown, Ohio in said District on May 4, 1928 at 10 o'clock in the forenoon, at which time and place any person interested may appear and show cause, if any they have, why an order authorizing such sale should not be granted.

PAUL E. CARSON,
Referee in Bankruptcy."

And the Referee, upon the filing of such petition, mailed to those named as claiming any lien on the property therein described, including the Treasurer of Trumbull County, Ohio, the following notice:

"IN THE DISTRICT COURT OF THE UNITED STATES.
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

IN THE MATTER OF THE STERLING KNIGHT CO., BANKRUPT.	IN BANKRUPTCY NOTICE OF APPLICATION FOR LEAVE TO SELL ASSETS AND MARSHAL LIENS.

To all creditors of said bankrupt:

Take Notice that the trustee herein has filed his application for leave to sell at public or private sale free and clear of all incumbrances real estate, buildings and building equipment. Property located in Howland Twp. at City of Warren limits, containing 21 acres. For better description see Trustee's petition to sell. Belonging to above estate and that said application will be for hearing before the undersigned Referee in Bankruptcy, at his offices, 310-11-12 Home Savings and Loan Building, in the City of Youngstown, Ohio, in said District, on May 4, 1928 at 10 o'clock in the forenoon, at which time and place any person interested may appear and show cause, if any they have, why an order authorizing such sale should not be granted.

PAUL E. CARSON,
Referee in Bankruptcy.

Unless your interest is set up by proper pleading at or prior to said hearing an order will be entered finding that you have no lien."

Both of the notices so mailed were received by the then Treasurer of Trumbull County, Ohio, who upon receipt thereof mailed to the Referee a statement of the taxes due upon the real estate described in the Trustee's petition to sell, being the same as that described in plaintiff's petition herein, which statements, received and filed by the Referee on April 30, 1928, showed that there was then due to the Treasurer of Trumbull County, Ohio, for taxes upon the same for the years 1924, 1925, 1926 and 1927 the sum of $9,717.25, including interest and penalty to such date. Other lien holders named as parties defendant in the Trustee's petition to sell likewise filed a statement of their claims, including Bert B. Buckley, the duly elected, qualified and acting Treasurer of the State of Ohio, who filed a statement of claim on April 30, 1928 to the effect that the bankrupt was indebted to the State of Ohio for franchise fee and penalty for the year 1924 in the sum of $6,037.50, and C. F. Routzahn, Collector of Internal Revenue for the Eighteenth Collection District of Ohio on May 16, 1928 filed his statement of claim setting forth that there was due to the United States the sum of $17,266.00 for manufacturer's excise tax for the period from May 1924 to June 1925 inclusive, for which a lien had been filed with the Recorder of Trumbull County, Ohio, August 10, 1925.

5. On the 16th day of June 1928 the Referee entered an order reciting that the petition of the Trustee to marshal liens and to sell the real estate of the bankrupt came on for hearing, together with the answers and cross petitions of Frank F. Musser, County Treasurer of Trumbull County, Ohio, and other lien holders, and that after hearing the evidence and examining the same the Referee found that The Union Trust Company, Trustee, of Cleveland, Ohio, by virtue of a deed of trust dated June 1, 1923, had a good and valid first lien upon the property in the sum of $231,000.00; that the Old Dominion Mortgage Company of Cleveland, Ohio, by virtue of a deed of trust dated October 31, 1924, had a good and valid second lien upon the property in the sum of $18,999.00; that Frank F. Musser, County Treasurer, had a good and valid lien upon the premises in the sum of $9,717.25, that the State of Ohio had a good and valid

lien upon the premises in the sum of $6,037.50 and that C. F. Routzahn, Collector of Internal Revenue of the United States, had a good and valid lien upon the premises in the sum of $17,266.00; that the lien of C. F. Routzahn, Collector of Internal Revenue, and the lien of Bert B. Buckley, Treasurer of the State of Ohio, and the lien of Frank F. Musser, Treasurer of Trumbull County, Ohio, were of equal priority and were the third lien upon the property described in the Trustee's petition to sell, being the same as that described in the petition herein. The Referee further ordered that the liens and rights of the lien holders be transferred from the real estate to the fund to be derived from the sale thereof, and that the Trustee be and he thereby was authorized and directed to offer the real estate for sale at public auction on the 10th day of July 1928, free and clear of all liens and incumbrances. At none of the hearings in the bankruptcy proceedings was the defendant Frank F. Musser, County Treasurer, present in person or represented by legal counsel and with the exception of the notice recited in finding of fact numbered 6 herein neither the said Frank F. Musser, County Treasurer, nor the Prosecuting Attorney's Office had actual knowledge of the finding of the court determining the priority of liens until on or about the 12th day of February 1929.

6. On the 29th day of June 1928 the Referee mailed to all the creditors of The Sterling-Knight Company the following notice:

"In the District Court of the United States.
Northern District of Ohio,
Eastern Division,

In Bankruptcy.

In the Matter of
The Sterling Knight Co.,
Bankrupt. } Notice of Sale.

To all Creditors of said Bankrupt:

Notice is hereby given that the Trustees herein will sell at Public Sale on July 10, 1928, at 2:00 o'clock P. M., at No. ..... on premises Warren, Ohio, the following property belonging to said bankrupt's estate:

Real Estate, buildings and building equipment. Property located in Howland Twp. at city of Warren limits, containing 21 acres. For better description see Trustee's petition to sell.

PAUL E. CARSON,
Referee in Bankruptcy.

Youngstown, Ohio, June 29, 1928."

which notice was received by the then Treasurer of Trumbull County, Ohio.

7. On July 12, 1928 the Trustee reported to the Referee that on July 10, 1928 and at the appointed time he offered the real estate of the bankrupt for sale pursuant to previous orders of the Referee, and that the highest and best offer obtainable was an offer from The Union Trust Company, Trustee, of Cleveland, Ohio, for the sum of $75,000.00. The Referee, upon consideration of such report and on the 12th day of July 1928, approved and confirmed the same and ordered that the offer of The Union Trust Company, Trustee, of Cleveland, Ohio, be accepted and directed the Trustee to forthwith execute proper instruments of title upon receipt of the payment of the purchase money.

8. Thereafter and on the 5th day of September 1928 the Trustee conveyed the real estate in question to The Union Trust Company, Trustee, of Cleveland, Ohio, and on the 7th day of September 1928 The Union Trust Company, Trustee, of Cleveland, Ohio, conveyed the same to the Warren-Cleveland Company, an Ohio corporation. On the 5th day of October 1928 the Warren-Cleveland Company conveyed the premises to I. J. Van Huffel, free and clear of all encumbrances excepting taxes for the year 1928, which I. J. Van Huffel assumed and agreed to pay.

9. I. J. Van Huffel, plaintiff in this action, was at the time of instituting these proceedings and still is the owner and in possession of the real estate aforesaid, which is the same as that described in his petition herein.

10. On January 19, 1929, and before the final due date thereof, plaintiff tendered to Frank F. Musser, the then duly elected, qualified and acting Treasurer of Trumbull County, Ohio, the sum of $952.89 in payment of the taxes due for the first half of the year 1928 upon the real estate herein involved, and on July 20, 1929, and before the final due date thereof, the plaintiff duly

tendered to the defendant, Frank F. Musser, the then Treasurer of Trumbull County, Ohio, the sum of $1905.78 in payment of taxes for the full year 1928 and upon the real estate herein involved. Shortly thereafter the term of office of Frank F. Musser as County Treasurer of Trumbull County, Ohio, expired and Trace D. Harkelrode was elected to succeed the said Frank F. Musser and he duly qualified as such and has been substituted as party defendant for the said Frank F. Musser herein, and he is now the duly elected, qualified and acting Treasurer of Trumbull County, Ohio. On January 20, 1930, the plaintiff duly tendered to the defendant, Trace D. Harkelrode, as County Treasurer, the sum of $3172.47 in full payment of taxes upon the real estate herein involved for the full year 1928 and for the full year 1929, the tender for the latter year being upon a reduced valuation in the amount of $79,168.00 for such real estate, as claimed by the plaintiff to be the true value thereof in money in a complaint theretofore filed by the plaintiff with the Auditor of Trumbull County, Ohio, for the protest of assessed valuation for tax purposes. Each of the tenders so made to Frank F. Musser and his successor in office, Trace D. Harkelrode, were refused for the stated reason that previous taxes for the years 1924, 1925, 1926 and 1927 had not been paid.

11. The plaintiff, I. J. Van Huffel, has at all times been and is now ready, willing and able and offers to pay the amounts so tendered by him or such other amounts as may be properly assessed against the real estate herein involved for the years 1928 and 1929.

12. On February 21, 1929 H. B. Doyle, as Trustee in Bankruptcy, filed his final account with the Referee in Bankruptcy which shows the following receipts:

Public sale of real estate	$ 75,000.00
Sale of mortgaged personal property	96,527.30
Refund from United States Government	2,500.00
Miscellaneous	44.46
Total	$174,071.76

and that the amounts received from the sale of real estate and mortgaged personal property were paid to the first and second mortgage holders in accordance with the order of the Referee in Bankruptcy, except a sufficient amount thereof which, together with the $2500.00 and

$44.46 of unencumbered funds, was necessary to pay the costs of administration. The costs of administration totalled $19,171.46 including attorneys' fees, Referee's fees of $1850.00 and Trustee's fees of $1850.00, which two latter disbursements were made July 24, 1928. All disbursements made by Trustee in Bankruptcy except attorneys' fees and State and Federal Court Receivers' compensation, which three items aggregated $6,526.12, were made prior to January 1, 1929. Frank F. Musser, the Treasurer of Trumbull County and his successor in office made no application other than the statement of claim referred to in paragraph 4 hereof to Bankruptcy Court to have the taxes for the years 1924, 1925, 1926 and 1927 paid out of any of the funds in the hands of the Trustee. On the 15th day of March 1929 the final report of H. B. Doyle, Trustee in Bankruptcy, was approved and confirmed by the Referee in Bankruptcy and H. B. Doyle as Trustee was discharged from any further duties therein, and the bankrupt estate of The Sterling-Knight Company was closed.

13. Taxes due the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927 upon the real estate herein involved have not been paid. No exceptions were taken by the Treasurer of Trumbull County, Ohio, to any of the proceedings had in the bankruptcy court, nor within the time limited by law therefor was any petition to review any of the rulings of the Referee filed in the United States District Court.

CONCLUSIONS OF LAW.

1. The Bankruptcy Court had no power or jurisdiction to relieve the real estate belonging to the bankrupt estate of The Sterling-Knight Company from the taxes which, with penalty and interest had accrued at the time the real estate was ordered to be sold, and consequently taxes due to the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927, plus penalty and interest, are still a lien upon the real estate described in plaintiff's petition, which can be collected in the manner authorized by the laws of the State of Ohio.

2. The fact that taxes for the years 1924, 1925, 1926 and 1927, plus penalty and interest, were a lien upon the property described in plaintiff's petition and were due and payable did not justify the Treasurer of Trumbull County in refusing to accept from plaintiff, I. J. Van

Huffel, the payment of the taxes for the years 1928 and 1929 when payment of the same, as herein-above found, was tendered.

3. Taxes due the Treasurer of Trumbull County for the year 1928 upon the real estate described in plaintiff's petition are still a lien thereon but without penalty or interest.

4. Taxes for the year 1929 are a lien upon the real estate described in plaintiff's petition and are to be determined by the Auditor according to law upon the determination of the complaint filed by plaintiff with the Auditor of Trumbull County upon the assessed valuation for tax purposes of said property for the year 1929.

It is by the court, therefore,

ORDERED, ADJUDGED AND DECREED that plaintiff's petition be and the same hereby is dismissed and that the defendant have and recover from the plaintiff his costs herein expended taxed at $.....

To all of which the plaintiff, I. J. Van Huffel, excepts, and his motion for a new trial is overruled, to which he likewise excepts.

Approved:

JOHN POLLOCK,
Presiding Judge.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF TRUMBULL COUNTY, OHIO, TO CERTIFY ITS RECORD.

(Filed in the Supreme Court of Ohio, October 14, 1930.)

Comes now I. J. Van Huffel, plaintiff in error herein, and represents to the Court that the Court of Appeals of Trumbull County, at the September Term of said Court, to-wit: On the 17th day of September, A. D. 1930, rendered a certain judgment against the said I. J. Van Huffel, plaintiff in error, in favor of Trace D. Harkelrode, Treasurer, defendant in error, in a cause therein pending, wherein I. J. Van Huffel was plaintiff and Trace D. Harkelrode, Treasurer, was defendant, being cause No. 613 on the docket of said court, said cause having come into said court by appeal by defendant from the judgment of the Court of Common Pleas.

The said I. J. Van Huffel, plaintiff in error herein, moves the Court for an order directing the said Court of Appeals to certify the record of said cause to this Court for the following reasons, to-wit:

1. There is probable error in the proceedings of said court in said cause.

2. The questions involved in said proceedings are of public and great general interest within the meaning of Article IV, Section 2 of the Constitution of the State of Ohio, and this Court has jurisdiction to and out to review said judgment.

(Signed) ALONZO M. SNYDER,
H. H. HOPPE,
Attorneys for I. J. Van Huffel, Plaintiff in Error.

SNYDER, THOMSEN, FORD, SEAGRAVE & ROUDEBUSH, and
FILLIUS & FILLIUS,
Of Counsel.

Notice and Proof of Service of Motion to Certify the Record are omitted in printing.

PETITION IN ERROR.

(Filed in the Supreme Court of Ohio, October 14th, 1930.)

Plaintiff in error, I. J. Van Huffel, files this petition in error as a matter of right for the reasons that the judgment herein complained of is in violation of the Constitution of the United States of America and the Constitution of the State of Ohio and of the rights of this plaintiff in error under said Constitutions of the United States of America and Ohio, and further says that the Court of Appeals of Trumbull County, Ohio, at the September term of said court, to-wit, on the 17th day of September, A. D. 1930, rendered a certain judgment against said I. J. Van Huffel, plaintiff in error, in a cause therein pending wherein I. J. Van Huffel was plaintiff and Trace D. Harkelrode, Treasurer, was defendant, being cause No. 613 on the docket of said Court, said cause having come into said Court by appeal by defendant from the judgment of the Court of Common Pleas, transcripts of docket and journal entries whereof, to-

gether with the findings of facts and all original papers therein are filed herewith.

There is error in said record and proceedings in this, to-wit:

1. Said court erred in overruling the motion of plaintiff below for a new trial.

2. Said judgment is contrary to the evidence and facts found by the court.

3. Said judgment is contrary to law.

4. Said judgment should have been rendered in favor of plaintiff in error, being the plaintiff below.

5. Said court erred in not requiring defendant below to seek the payment of taxes out of general funds in the hands of the trustee in bankruptcy.

6. Said court erred in not giving full force and effect to the judgment of the United States District Court, Northern District, Eastern Division of Ohio.

7. Said court erred in not giving full force and effect to the decisions of the United States Courts construing the United States bankruptcy laws.

8. Said court erred in not giving full force and effect to the United States bankruptcy laws.

9. Said court erred in deciding and adjudging that the United States Bankruptcy Court for the Northern District, Eastern Division of Ohio had no power or jurisdiction to relieve the real estate now belonging to plaintiff in error from taxes which were a lien at the time said real estate was sold through proceedings pending in said Bankruptcy Court, and that said taxes are still a lien upon the real estate described in plaintiff's petition and which can be collected in the manner authorized by the laws of the State of Ohio, and that such decision and judgment was not and is not in violation of the constitutional rights of plaintiff in error, and was not and is not a taking of his property and a denial to him of due process of law and the equal protection of law under and against the provisions of the Fourteenth Amendment of the Constitution of the United States, of Article 1, Section 8, Paragraph 4 of the Constitution of the United States, giving Congress power to establish uniform laws on the subject of bankruptcies, and of the bill of rights of the State of Ohio, particularly Article 1, Section 1 thereof, and of the Constitution of Ohio, particularly Article

1, Section 16, thereof; and plaintiff in error alleges that said decision and judgment of said court of appeals is in violation of his rights under the Constitution of the United States of America and the State of Ohio as above set forth.

10. Said court erred in permitting a collateral attack upon the judgment of the United States Bankruptcy Court made by it in the administration of a bankrupt estate.

11. Said court erred in not declaring that the property now owned by plaintiff below is free of the lien of taxes now standing on the tax duplicate of Trumbull County.

12. The court erred in not protecting plaintiff below, an innocent holder, in his title to real estate acquired from the purchaser thereof at a regular judicial sale made by the Bankruptcy Court.

13. The Court erred in not giving full force and effect to a judicial sale made by said Bankruptcy Court.

14. The court erred in declaring the judgment of the Bankruptcy Court a nullity.

15. Said court erred in rendering judgment for defendant in error, defendant below.

16. Said court commited other errors appearing upon the record.

WHEREFORE, plaintiff in error prays that the judgment of the Court of Appeals herein may be reversed and that he be restored to all things he has lost by reason thereof.

(signed) ALONZO M. SNYDER,
H. H. HOPPE,
Attorneys for I. J. Van Huffel, Plaintiff in Error.

SNYDER, THOMSEN, FORD, SEAGRAVE & ROUDEBUSH,
915 Williamson Bldg., Cleveland, Ohio,
and
FILLIUS & FILLIUS,
Second National Bank Bldg., Warren, Ohio,
Of Counsel.

Waiver of summons in error is omitted in printing.

MOTION TO DISMISS PETITION IN ERROR.

(Filed in the Supreme Court of Ohio, December 2nd, 1930.)

Now comes the defendant in error and moves the Court for an order dismissing the petition in error filed as of right in this action for the following reasons, to-wit:

1. That the action did not originate in the Court of Appeals.

2. That no constitutional question is involved in this case.

3. That the alleged constitutional question involved was not presented to or passed on by the Court of Appeals.

G. H. Bibrell,
Geo. W. Secrest,
Attorneys for Defendant in Error.

APPLICATION FOR REHEARING.

(Filed in the Supreme Court of Ohio, January 16th, 1931.)

Comes now I. J. Van Huffel, plaintiff in error in the above entitled cause, which cause was submitted to this court upon motion to require the Court of Appeals of Trumbull County to certify its record, said motion having been heard and having been refused, and also upon motion of defendant in error to dismiss the petition in error of plaintiff in error filed as a claimed matter of right, which motion was granted and said petition in error dismissed, and now applies to the court under its Rule XX for rehearing of both of said motions on the following grounds:

1. Public and great general interest.
2. Constitutional questions.
3. Error of law.
4. Desirability of a written opinion of this court.

Alonzo M. Snyder,
H. H. Hoppe,
Attorneys for I. J. Van Huffel, Plaintiff in Error.

CERTIFIED TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

In the Supreme Court of the State of Ohio.

DOCKET ENTRIES.

Oct. 14, 1930. Petition in error as of right, Waiver of Summons and entry of appearance filed.

Oct. 14, 1930. Court of Appeals Transcript, Common Pleas Court Transcript and Original Papers filed.

Oct. 14, 1930. Motion for an order to certify record, Pltffs. printed briefs on motion, Notice and Proof of Service filed.

Oct. 22, 1930. Stipulation for postponing the printing of record filed.

Dec. 2, 1930. Defendants printed brief filed. 12-3-30 P.S. filed.

Dec. 2, 1930. Motion by Defendant to dismiss Petition in Error as of right filed, notice and proof of service filed.

Dec. 9, 1930. Pltffs. printed reply brief and Additional Authorities filed.

Dec. 24, 1930. Petition in error dismissed, No debatable constitutional question involved. J. 32 P. 299.

Dec. 24, 1930. Motion for an order directing the Court of Appeals of Trumbull County to certify its record, Overruled. J. 32 P. 294.

Dec. 24, 1930. Motion by defendant to dismiss petition in error as of right, Sustained. J. 32-294.

Dec. 27, 1930. Original papers sent to Snyder, Ford, Thomsen, Seagrave & Roudebush.

Jan. 2, 1931. MANDATE ISSUED.

Jan. 2, 1931. CERTIFIED COPY OF ENTRY SENT CLERK.

Jan. 16, 1931. Application for re-hearing filed.

Feb. 7, 1931. Re-hearing Denied. J. 32—P. 316.

JOURNAL ENTRIES.

December 24, 1930. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas. etc., Motion for an order directing the Court of Appeals of Trumbull County to certify record. It is ordered by the Court that this motion be and the same hereby is overruled. J. 32 P. 294.

December 24, 1930. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas. etc., Motion by defendant to dismiss petition in error as of right. It is ordered by the Court that this motion be and the same hereby is sustained. J. 32 P. 294.

December 24, 1930. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas. etc. Error to the Court of Appeals of Trumbull County.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Trumbull County, upon the motion of defendant in error to dismiss the petition in error, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said petition in error be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $.....

Ordered, That a special mandate be sent to the Court of Appeals of Trumbull County, to carry this judgment into execution. J. 32 P. 299.

February 7, 1931. No. 22570, I. J. Van Huffel vs. Trace D. Harkelrode, Treas., etc. It is ordered by the Court that the Application for rehearing in the above entitled cause be and the same hereby is, denied. J. 32 P. 316.

CERTIFICATE OF THE CLERK.

STATE OF OHIO,
FRANKLIN COUNTY,
CITY OF COLUMBUS, SS.

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing is a true, full and correct copy, except as to omissions therein indicated, of the record and proceedings had in the case of I. J. Van Huffel, Plaintiff in Error v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, Defendant in Error, being cause No. 22570, as the same appears in the files and upon the records of the Supreme Court of Ohio now in my custody and control. No opinion was rendered by the Supreme Court of Ohio.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of the Supreme Court of Ohio to be affixed at Columbus, Ohio, this 20th day of April, 1931.

SEBA H. MILLER,
Clerk of the Supreme Court of Ohio.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 25, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(799)

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No.....

I. J. VAN HUFFEL,

Petitioner,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, successor in office and substituted as party defendant for Frank F. Musser, Former Treasurer of Trumbull County, Ohio,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio, and BRIEF IN SUPPORT OF PETITION.

H. H. HOPPE,
ALONZO M. SNYDER,
Attorneys for Petitioner.

SNYDER, THOMSEN, FORD, SEAGRAVE & ROUDEBUSH,
Williamson Building, Cleveland, Ohio,

FILLIUS & FILLIUS,
2nd National Building, Warren, Ohio,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. .....

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, successor in office and substituted as party defendant for Frank F. Musser, Former Treasurer of Trumbull County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of I. J. Van Huffel respectfully shows unto this Honorable Court:

A.
SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action to quiet the title (R. 1) of petitioner to certain real estate owned by him and of which he is in possession, against the claim (R. 3) of the respondent, who claims a lien thereon for taxes, penalty and interest due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. By way of reply (R. 5) to respond-

ent's answer, in which respondent set up his lien, petitioner set forth the fact that the real estate now owned by him was formerly owned by The Sterling-Knight Company, which, during its ownership thereof, was declared a bankrupt, and petitioner, after further setting forth at length certain proceedings had in the bankruptcy court to marshal liens upon such real estate (R. 5), to which proceedings respondent was a party and in which he appeared (R. 6), averred that the lien of the respondent had been fully adjudicated in the Bankruptcy Court of the United States for the Northern District of Ohio, Eastern Division, and that respondent now had no lien upon the premises described in his petition for taxes for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, found and determined (R. 26) that the District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, had no jurisdiction, power or authority to adjudicate the lien of the respondent for taxes, or to transfer the lien of the respondent from the property to the fund to be derived from the sale thereof, and that notwithstanding such adjudication in the Bankruptcy Court, respondent still had a valid lien on the premises for taxes for the years 1924, 1925, 1926 and 1927. The Supreme Court of Ohio denied (R. 33) petitioner's motion (R. 27) therein filed for an order directing the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review, and likewise dismissed (R. 33) petitioner's petition in error (R. 28) therein filed as of right.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Petitioner purchased the real estate herein involved free and clear of the lien asserted by respondent for taxes for the years 1924, 1925, 1926 and 1927 (R. 24), relying upon an order (R. 22) of a federal bankruptcy court directing the sale thereof free from such lien. This order was made in a proceeding which was then pending in the United States District Court for the Northern District of Ohio, Eastern Division, to marshal liens, in which respondent was named as a defendant (R. 20), of which he was notified as required by the federal bankruptcy act (R. 20), and in which he appeared and asserted his lien. (R. 22) The finding of the bankruptcy court (R. 7, 22) that respondent's lien was a third lien on the real estate involved, and its order that such lien be transferred from the property to the fund to be derived from the sale thereof, and that such property be sold free and clear of encumbrances, have never been modified, vacated or reversed. (R. 26) The finding and judgment of the Court of Appeals of Trumbull County, Ohio, that the federal bankruptcy court had no jurisdiction (R. 26) or power to transfer respondent's tax lien from the property to the fund to be derived from the sale thereof, or to order a sale of such property free from respondent's tax lien, place a construction upon Article 1, Section 8, paragraph 4 of the Constitution of the United States and upon the federal bankruptcy statutes which is wholly untenable: The precise question has never been before this Court, so far as counsels' research has disclosed, although the power, jurisdiction and authority of the bankruptcy court to order sales of real estate free and clear of encumbrances, including tax liens, has been up-

held by numerous decisions of the various United States Circuit Courts of Appeal and District Courts.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to a judgment and decree of a court of the United States, rendered in a cause of which the court of the United States had exclusive jurisdiction of the subject matter, in which respondent was named as a defendant, notified as required by law and in which he appeared and asserted the same lien he now asserts.

3. The finding and judgment of the Court of Appeals of Trumbull County, Ohio, cast a cloud upon the title of purchasers who heretofore have purchased property under an order of the bankruptcy court ordering the same sold free and clear of encumbrances. They act as a deterrent to the future sales of property in bankruptcy which bankruptcy courts might order to be made free and clear of encumbrances, and thus give rise to an important question of federal law which has not been but should, it is submitted, be settled by this Court.

4. The finding and judgment of the Court of Appeals of Trumbull County, Ohio, fail to protect and, in fact, deny the title, right, privilege and immunities which your petitioner claims under the constitution and statutes of the United States.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio, commanding that court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 22,570, I. J. Van Huffel, Plaintiff in

Error v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, substituted party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio, Defendant in Error, and that the decree and judgment of the Court of Appeals of Trumbull County, Ohio, be reversed by this Honorable Court, and that of the Common Pleas Court of Trumbull County, Ohio, in cause No. 28,887 upon its docket, entitled I. J. Van Huffel, Plaintiff, v. Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, substituted party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio, Defendant, be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

I. J. VAN HUFFEL,
By H. H. HOPPE,
And ALONZO M. SNYDER,
His Attorneys.

SNYDER, THOMSEN, FORD, SEAGRAVE & ROUDEBUSH,
Williamson Building, Cleveland, Ohio,

FILLIUS & FILLIUS,
2nd National Building, Warren, Ohio,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. .....

I. J. VAN HUFFEL,

Petitioner,

v.

TRACE D. HARKELRODE, TREASURER OF TRUMBULL COUNTY, OHIO, Successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio.

Respondent.

BRIEF OF PETITIONER

In Support of Petition for Writ of Certiorari.

I.

THE OPINIONS OF THE COURTS BELOW.

The written opinion of the Court of Appeals of Trumbull County, Ohio, is not reported, but is set forth at length in the record on page 13. No written opinions were rendered by the Supreme Court of Ohio or by the Common Pleas Court of Trumbull County, Ohio.

II.

JURISDICTION.

1. Section 344 of Title 28, U. S. C., (Judicial Code Section 237, amended) provides:

"(a) • • •

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein * * * any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *

"(c) * * *"

Section 350 of Title 28, U. S. C., provides:

"No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *"

2. This proceeding was instituted in the Common Pleas Court of Trumbull County, Ohio, on the 23rd day of March, 1929. (R. 1.) The Common Pleas Court of Trumbull County, Ohio, rendered final judgment for your petitioner on the 28th day of March, 1930. (R. 10.) Upon appeal by respondent to the Court of Appeals of Trumbull County, Ohio, judgment was entered for the respondent on the 17th day of September, 1930. (R. 19.) Within thirty days and on the 14th day of October, 1930, petitioner filed in the Supreme Court of Ohio both a petition in error (R. 28) as of right (Section 12270 of the General Code of Ohio), claiming a constitutional question to be involved, and a motion (R. 27) for an order requiring the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review. (Rule VIII, Section 1, 113 O. S. lxxiii.) Petitioner's petition in error filed in the Supreme Court of Ohio as of right was dismissed (R. 33), and petitioner's motion for an order directing the Court of Appeals of Trumbull County,

Ohio, to certify to the Supreme Court of Ohio its record for review was overruled (R. 33) on the 24th day of December, 1930. On the 16th day of January, 1931, and within the time limited by law therefor (Rule XX, Section 1, 113 O. S., lxxxvi), petitioner filed in the Supreme Court of Ohio an application for rehearing (R. 31), both as to his petition in error filed as of right and his motion for an order requiring the Court of Appeals of Trumbull County, Ohio, to certify thereto its record for review. This application for rehearing was denied by the Supreme Court of Ohio on the 7th day of February, 1931 (R. 33), and thereupon the judgment of the Court of Appeals of Trumbull County, Ohio, became the final judgment of the highest state court in which a judgment in this cause could be had, unless it can be said that the filing by petitioner, in the Supreme Court of Ohio, of a transcript of the record of the proceedings had in the Court of Appeals (R. 32), which petitioner was required to do at the time of filing therein his petition in error (Section 12263 of the General Code of Ohio), resulted in the rulings of the Supreme Court of Ohio, herein above referred to, becoming the final judgment of the highest state court in which a judgment in this cause could be had.

3. The suit below was one on behalf of petitioner to quiet title to certain real estate, which he owned and of which he was in possession, against the claim of the respondent, who claimed a lien thereon for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. (R. 1) By way of reply (R. 5) to respondent's answer to petitioner's petition, in which answer respondent set up his claim (R. 3), petitioner averred that the real estate now owned by him was formerly owned by The Sterling-Knight Company, an Ohio corporation, which at the time of its ownership thereof was declared a bankrupt by the District Court of the United States for the Northern District of Ohio, Eastern Division; that one H.

B. Doyle was subsequently elected and he duly qualified as the Trustee in Bankruptcy of The Sterling-Knight Company; that as such Trustee he filed, with the District Court of the United States for the Northern District of Ohio, Eastern Division, his petition to marshal the liens upon such real estate, to determine their validity and priority, and praying for an order of sale thereof, free and clear of liens; that respondent was made a party defendant to such proceedings, was duly notified thereof as required by law and filed his answer therein, setting up his lien for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927; that the District Court of the United States for the Northern District of Ohio, Eastern Division, determined respondent's lien for taxes to be a third lien upon the real estate, and transferred the same, as well as the liens of other lienholders, from the property to the fund to be derived from the sale thereof, and directed the Trustee in Bankruptcy to sell the same at public sale, free and clear of all liens and encumbrances, including the lien of respondent; that pursuant to such order the Trustee in Bankruptcy sold said premises at public sale, free and clear of all liens including the lien of the respondent; that petitioner claims title to the premises so sold by mesne conveyances from the purchaser at such sale and pursuant to and under the terms of such decree of the District Court of the United States for the Northern District of Ohio, Eastern Division; that the order of such court is still in full force and effect, has never been vacated, modified or reversed, and that the same fully adjudicated the right of respondent, and that by reason thereof the respondent now has no right, title, interest, claim to or lien upon the premises described in petitioner's petition for taxes due the County of Trumbull and State of Ohio for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, held and determined that the

Bankruptcy Court of the United States for the Northern District of Ohio, Eastern Division, was wholly without jurisdiction, power or authority (R. 26) to transfer respondent's tax lien from the premises to the fund to be derived from the sale thereof, or to extinguish the lien of respondent and that consequently such lien was still a lien thereon, which the respondent was authorized to enforce in the manner prescribed by the statutes of the State of Ohio. (R. 26) Thus the title, right, privilege and immunity of petitioner, claimed under the constitution and statutes of the United States, set forth and pleaded in petitioner's reply to the respondent's answer, was denied by the Court of Appeals of Trumbull County, Ohio. Under the provisions of Section 344 of Title 28, U. S. C. *supra*, it is respectfully submitted that this Court has jurisdiction to review such judgment.

4. The following cases sustain the jurisdiction of this Court to review the judgment of the Court of Appeals of Trumbull County, Ohio:

Diepasseur v. Rocherean, 21 Wall. 130;
Embry v. Palmer, 107 U. S. 3, 9;
Factors etc. Insurance Co. v. Murphy, 111 U. S. 738;
New Orleans Spanish Fort & Lake R. R. Co. v. Delamore, 114 U. S. 501;
Traer v. Clews, 115 U. S. 528;
Crescent City etc. Co. v. Butchers Union etc. Co., 120 U. S. 141;
Pendleton v. Russell, 144 U. S. 640;
Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Long Island Loan & Trust Co., 172 U. S. 493;
National Foundry & Pipe Works v. Oconto City Water Supply Co., 183 U. S. 216.

In *Myers v. International Trust Co.*, 263 U. S. 64, at page 69, the late Chief Justice said:

"The case here turns on the effect of the bankruptcy record and so presents a federal question whether full faith and credit was given to the judgment of the federal court."

In *Supreme Lodge v. Meyer*, 265 U. S. 30, it was said:

"While proceedings in Federal courts are not within the terms of Article IV, Sec. 1 of the Constitution, they nevertheless must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state."

5. The court will observe that petitioner has filed two petitions for writs of certiorari. The reason for so doing is that counsel for petitioner have been unable to ascertain under the peculiar circumstances of the case as to which state court the writ of certiorari, if granted, should be directed by this Court. Upon receiving an adverse decision in the Court of Appeals of Trumbull County, Ohio, petitioner filed, in the Supreme Court of Ohio, as is common practice, both a motion for an order directing the Court of Appeals to certify thereto its record for review, and a petition in error as of right, claiming a constitutional question to be involved. (R. 28) Article IV, Section 2 of the Constitution of Ohio provides that the Supreme Court:

"* * * shall have * * * appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse the judgment of the court of appeals."

A certified transcript of the record of the proceedings had in the Court of Appeals of Trumbull County, Ohio, was not filed in the Supreme Court of Ohio, nor was it required to be filed, at the time petitioner filed therein his motion

for an order directing the Court of Appeals to certify thereto its record for review; though such record was filed, (R. 32) and was required to be filed, in the Supreme Court of Ohio at the time petitioner filed therein his petition in error as of right.

Section 12263 of the General Code of Ohio provides:

> "With his petition, plaintiff in error shall file either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of. * * *"

Had no petition in error been filed in the Supreme Court of Ohio, then in view of the denial by the Supreme Court of Ohio of petitioner's motion to certify, the writ of certiorari of this Court, if granted, would have to be directed to the Court of Appeals of Trumbull County, Ohio.

Second National Bank v. First National Bank, 242 U. S. 600;
American Railway Express Co. v. Levee, 263 U. S. 19;
Matthews v. Huwe, 269 U. S. 262;
Minneapolis, St. P. & S. Ste. M. R. Co. v. Rock, 279 U. S. 410.

Had no motion to certify the record been filed in the Supreme Court of Ohio, then in view of the fact that that court dismissed petitioner's petition in error upon the grounds that no debatable constitutional question was involved, quaeri whether this Court would have any jurisdiction upon writ of certiorari, the petitioner not having exhausted all of his remedies in the state courts. *Matthews v. Huwe, supra.* If this Court did have jurisdiction under such circumstances, then its writ for certiorari, if granted, would have to be directed to the Supreme Court of Ohio. *Matthews v. Huwe, supra.* In the instant case, where both a motion to certify and a petition in error were filed in the

Supreme Court of Ohio, counsel for petitioner were fearful that if they requested a writ for certiorari to be granted, directed to the Supreme Court of Ohio, then, if the same were granted and in view of the fact that petitioner's petition in error filed in the Supreme Court of Ohio was dismissed upon the ground that there was no debatable constitutional question involved, the only question which counsel would be permitted to raise in this Court would be whether or not any constitutional question was involved. Counsel for petitioner do not desire to be so restricted in the questions which the record presents, but desire to raise in this Court, should their petition be granted, the questions of general law presented by the record, as well as the constitutional question. Therefore two petitions for writs of certiorari have been filed, one asking that the writ, if granted, be directed to the Supreme Court of Ohio and the other asking that the same, if granted, be directed to the Court of Appeals of Trumbull County, Ohio. At the time of filing each petition certified copies of the record were filed, one certified by the Clerk of the Supreme Court of Ohio and the other by the Clerk of the Court of Appeals of Trumbull County, Ohio.

III.

STATEMENT OF THE CASE.

Petitioner filed his action below under favor of Section 11901 of the General Code of Ohio, which provides as follows:

> "§11901. *Action to quiet title.*—An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having, or claiming to have an estate or interest in remainder or reversion in real property,

against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

In his petition filed below (R. 1) petitioner alleged that he was the owner of, and was in possession of, the real estate described in his petition, and that the respondent claimed an estate or interest therein adverse to the petitioner, and he prayed that respondent be compelled to answer, setting up his interest, or be forever barred, and that upon final hearing his title might be quieted as against any and all claims of respondent. To this petition the respondent filed an answer (R. 3) claiming certain taxes to be due him as Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926, 1927, 1928 and 1929. Taxes for the years 1928 and 1929 are not here in dispute. As to the taxes which the respondent claimed for the years 1924, 1925, 1926 and 1927, the petitioner by way of reply (R. 5) to respondent's answer, and, after averring and setting forth at length certain proceedings had in the District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, averred that respondent's lien for taxes for such years had been fully adjudicated in such bankruptcy proceedings, and that they now were not a lien upon petitioner's real estate, and that by reason of the proceedings had in the District Court of the Uni[redacted]States for the Northern District of Ohio, Eastern Division, respondent had no claim, right to or lien upon such real estate for taxes for the years 1924, 1925, 1926 and 1927. The Court of Appeals of Trumbull County, Ohio, made a finding of fact (R. 19) separate and apart from its conclusions of law. (R. 26). The facts are not in dispute. The error herein complained of arises over the first conclusion of law made by the Court of Appeals of Trumbull County, Ohio, which is as follows:

"The Bankruptcy Court had no power or jurisdiction to relieve the real estate belonging to the bankrupt estate of The Sterling-Knight Company from the taxes which, with penalty and interest had accrued at the time the real estate was ordered to be sold, and consequently taxes due to the Treasurer of Trumbull County, Ohio, for the years 1924, 1925, 1926 and 1927, plus penalty and interest, are still a lien upon the real estate described in plaintiff's petition, which can be collected in the manner authorized by the laws of the State of Ohio." (R. 26)

IV.

SPECIFICATIONS OF ERROR.

It is respectfully submitted that the facts as found by the Court of Appeals of Trumbull County, Ohio, do not support its judgment, in that:

1. The District Court of the United States for the Northern District of Ohio, Eastern Division, in the bankruptcy proceedings of The Sterling-Knight Company, did have the power and authority to transfer the tax lien of the respondent from the real estate of The Sterling-Knight Company to the fund to be derived from the sale thereof, and did have the power and authority to order the sale of such real estate free and clear of all encumbrances, including the tax lien of the respondent.

2. The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to the judgment and decree of the District Court of the United States for the Northern District of Ohio, Eastern Division, in the bankruptcy proceedings of The Sterling-Knight Company, to which respondent was named as a party defendant, of which he was notified as required by law and in which he appeared and set forth the same tax lien which he now seeks to assert against the property of petitioner.

V.

UNITED STATES CONSTITUTIONAL, STATUTORY PROVISIONS AND GENERAL ORDERS INVOLVED.

Article I, Section 8, paragraph 4, of the Constitution of the United States provides:

"The Congress shall have power * * * to establish uniform laws on the subject of bankruptcies throughout the United States."

Section 1, Title 11, U. S. C. (Section 2 of the Bankruptcy Act) provides:

"The courts of bankruptcy * * * , namely, the district courts of the United States in the several states, * * * are hereby invested * * * with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to

(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title;

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power

it would possess were certain specific powers not herein enumerated."

Section 45, Title 11, U. S. C. (Section 22 of the Bankruptcy Act) provides:

"(a) After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specifically with only limited authority to act in the premises or to consider and report such specified issue; * * *."

Section 53, Title 11, U. S. C. (Section 30 of the Bankruptcy Act) provides:

"All necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

General Order XII provides:

"1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; * * *. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

General Order XVIII provides:

"1. All sales shall be by public auction unless otherwise ordered by the court."

General Order XXVII provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Section 66, Title 11, U. S. C. (Section 38 of the Bankruptcy Act) provides:

"Referees respectively are invested, subject always to a review by the judge, * * * with jurisdiction to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *."

Section 75, Title 11, U. S. C. (Section 47 of the Bankruptcy Act) provides:

"Trustees shall * * * (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; * * *."

Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act) provides:

"(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of * * * (4) all proposed sales of property; * * *.

"(c) All notices shall be given by the referee, unless otherwise ordered by the Judge."

Section 104, Title 11, U. S. C. (Section 64 of the Bankruptcy Act) provides:

"Debts which have priority. (a) The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments, the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estate, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankruptcy in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses

of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

Section 110, Title 11, U. S. C. (Section 70 of the Bankruptcy Act) provides:

"The trustee of the estate of a bankrupt, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *."

Section 687 of Title 28, U. S. C., provides:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

ARGUMENT.

1. In a proceeding in a court of bankruptcy to sell and marshal liens, to which the Treasurer of Trumbull County, Ohio, is made a party and in which he appears and sets up his tax lien, has the court the power and jurisdiction to order the bankrupt's real estate sold free and clear of the lien of the Treasurer of Trumbull County, Ohio, for taxes due the county and state, and, by the same order, transfer such lien from the property to the fund to be derived from the sale thereof?

The finding of the Referee in Bankruptcy, (R. 8, 23), that the lien of the respondent for taxes was a third lien upon the real estate in question, might have been erroneous. The lien for taxes assessed against real estate is usually held to be the first lien thereon, and such taxes are usually ordered to be first paid out of the proceeds of any judicial sale. It was the lien of the United States filed by C. F. Routzahn, Collector of Internal Revenue, which confused the referee. The latter lien was one for manufacturer's excise tax (R. 22) which was not filed for record with the Recorder of Trumbull County until August 10, 1925 (R. 22), long after the mortgagees had procured their mortgage lien. (R. 22) Section 115, Title 26, U. S. C., provides:

> "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property * * *.
>
> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> "(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; * * *."

Under this Section of the Code the lien of C. F. Routzahn, Collector of Internal Revenue, was admittedly a third lien, being subsequent to the mortgage liens of The Union Trust

Company, Trustee, and The Old Dominion Mortgage Company. Section 104, Title 11, U. S. C., (page 20 *supra*) (Section 64 of the Bankruptcy Act), provides that taxes due the United States, state, county, district or municipality are of equal priority and the referee could not see how, in view of this provision of the Bankruptcy Act, he could give the Treasurer of Trumbull County a first lien and C. F. Routzahn a third lien. So he found that all taxes were a third lien. Perhaps he had in mind that there were general funds from which the taxes might have been paid, if proper application therefor had been made. But the fact that the referee's finding might have been erroneous does not warrant the conclusion that the bankruptcy court was without power or jurisdiction to make the order it did make.

In *Lessee of Paine v. Mooreland*, 15 O. 435 at 445, it is said:

> "A court, then, may act, first, without power or jurisdiction, second, having power or jurisdiction, may exercise it wrongfully; or, third, irregularly. In the first instance, the act or judgment of the Court is wholly void, and is as though it had not been done. The second is wrong, and must be reversed upon error. The third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power."

It is the position of counsel for petitioner that at most the bankruptcy court acted erroneously and, its error not having been corrected by proper error proceedings, its finding is now final and conclusive. It was simply an *erroneous* decision.

The claim of the respondent is based upon Section 5671 of the General Code of Ohio, which provides as follows:

> "§5671. *When lien of state for taxes attaches.*— The lien of the state for taxes levied for all purposes,

in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *"

This Section of the General Code of Ohio can have no bearing upon the question here presented for the power and jurisdiction of the bankruptcy court is derived from and defined by the acts of Congress and not the legislative enactments of Ohio or of any other state.

It must be admitted that by virtue of Article I, Section 8, paragraph 4 of the United States Constitution, (page 17 *supra*) which authorizes Congress to establish an uniform bankruptcy law, the bankruptcy laws enacted pursuant thereto are paramount to any state laws upon the same subject, and that when the *state laws* in any wise *conflict* with the bankruptcy laws, the latter prevail. *International Shoe Company v. Pinkus,* 278 U. S. 261. *In re Moore,* 42 F. (2nd) 475.

The bankruptcy act enacted pursuant to this provision of the Constitution authorizes the bankruptcy court to refer the administration of bankrupt estates to referees, either generally or for some specific purpose. Section 45, Title 11, U. S. C. (page 18 *supra*) (Section 22 of the Bankruptcy Act). General Order in Bankruptcy XII, (page 18 *supra*) promulgated by the Supreme Court of the United States, pursuant to Section 53, Title 11, U. S. C. (page 18 *supra*) (Section 30 of the Bankruptcy Act), provides that when a case is referred to the referee

"all proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

Section 66, Title 11, U. S. C. (Section 38 of the Bankruptcy Act) provides:

"Referees respectively are invested, subject always to a review by the judge, * * * with jurisdiction

to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *."

There is no requirement in the bankruptcy act or in the general orders that sales of the bankrupt's property can be ordered only by the judge, and consequently, in view of the finding by the Court of Appeals that the bankrupt estate here under consideration was referred (R. 19) to the referee for administration, he had the authority, if any one had it, to order the sale in question and to marshal liens.

There is nothing to be found in the Bankruptcy Act, which expressly authorizes the court to sell the property of the bankrupt free and clear of all liens or of any specific lien, or which requires the court to sell the property of the bankrupt subject to all liens or to any specific lien. But inasmuch as Section 1, Title 11, U. S. C. (page 17 *supra*) (Section 2 of the Bankruptcy Act) invests bankruptcy courts with such jurisdiction at law *or in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings, to

"(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

"(6) *bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;* (Italics ours.)

"(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title."

and further, inasmuch as Section 75, Title 11, U. S. C. (page 19 *supra*) (Section 47 of the Bankruptcy Act) requires trustees in bankruptcy to collect and reduce to money the property of the bankrupt, it has been held times without number that a bankruptcy court can sell the property of the bankrupt free and clear of all liens, or subject to liens, or free from some liens and subject to others, transferring the liens from the property to the fund to be derived from the sale thereof.

People's Homestead Association v. Bartlette, 33 F. 2d. 561 (C. C. A. 5th Circuit);

In re Danville Hotel Co., 33 F. 2d. 162 (District Court, Illinois);

In re Gish, 32 F. 2d. 322 (District Court, Kentucky);

In re Macklem, 28 F. 2d. 417 (District Court, Maryland);

In re Southern Florida Realty Corporation, 16 F. 2d. 171 (District Court, Florida);

In re Gimbel, 294 Fed. 883 (C. C. A. 5th Circuit);

Gantt v. Jones, 272 Fed. 117 (C. C. A. 4th Circuit);

In re Franklin Brewing Co., 249 Fed. 333 (C. C. A. 2nd Circuit);

In re Reading Hat Mfg. Co., 224 Fed. 786 (District Court, Pennsylvania);

In re National Boat & Engine Co., 216 Fed. 208 (District Court, Maine);

Cf. Whitney v. Wenman, 198 U. S. 539;

Murphey v. Hofman Co., 211 U. S. 562.

In *Gantt v. Jones*, 272 Fed. 117, the court said:

"1. The power of a bankruptcy court to order a sale of the bankrupt's property free from liens is not expressly conferred but is necessarily implied, as such sale is often necessary to the due execution of the power and duty to reduce the assets to money and distribute it to creditors."

In *In re National Boat & Engine Company*, 216 Fed. 208, the court said:

"1. Under the broad powers conferred by Bankruptcy Act July 1, 1898, c. 541, Section 2 (7) 30 Stat. 546, (U. S. Comp. st. 1901, p. 3421) to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto, when property has thus become subject to a court of bankruptcy, jurisdiction exists to pass on questions relating to its disposition and to determine the extent and character of liens thereon and rights therein, and to that end to bring in and substitute additional parties whenever necessary for a complete determination of the matter in controversy.

"2. As a consequence of the power of a court of bankruptcy to order the sale of property of a bankrupt free of liens, it has jurisdiction to determine the validity, extent and relative priority of liens on the proceeds which stand as a substitute for the property sold, and in proceedings for the distribution of such fund, the trustee should appear and protect the rights of the estate."

And such power can be exercised even though the lien claimant objects. *In re Gimbel, supra; In re Franklin Brewing Co., supra.*

In *In re Loveland*, 155 Fed. 838 (C. C. A. 1st Circuit), it was held that the order of sale could be issued without first determining the amount or the validity of the liens.

True it is that the bankrupt estate acquires no greater title than the bankrupt itself had and that it takes title

subject to all such liens and encumbrances as are not avoided by the bankruptcy laws, but the property having passed into the hands of a court of bankruptcy the *remedy* of lien claimants is alone affected. As was said by the court in *In re Reading Hat Mfg. Co.*, 224 Fed. 786:

> "A trustee in bankruptcy succeeds by operation of law to the title of the bankrupt; but liens and incumbrances, not avoided by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544), remain unaffected, except so far as the remedy of enforcement is limited by the property having passed into the custody of the court."

By reason of the provisions of Section 94, Title 11, U. S. C. (page 19 *supra*) (Section 58 of the Bankruptcy Act), creditors are entitled to at least ten days' notice by mail of all proposed sales of property. By reason of the finding of fact of the Court of Appeals with respect to the notices given in the instant case (R. 20), the validity of the order of the bankruptcy court cannot be questioned upon that ground.

In all of the cases above cited, in which property was ordered sold free and clear of encumbrances, the particular question here involved, to-wit, whether such order can be made as against the lien of a state for taxes was not passed upon or decided. It would seem, however, that inasmuch as a bankruptcy court must of necessity be authorized to sell property free and clear of *all* encumbrances, when the sale of the property in that form will, in the opinion of the bankruptcy court, be of greater benefit to the bankrupt's estate than such sale would be if made subject to encumbrances, there is no reason, either at law or in equity, why that doctrine should alone apply to lien claimants other than the Government, state or county. Certainly they are each as necessary a party as any other lien claimant to a complete determination of the question of the

legality, amount and priority of the liens upon the bankrupt's property, a question which the bankruptcy court must determine in order to know whether such property should be abandoned, because there is no equity therein for the general creditors, or whether the bankruptcy court should exercise the jurisdiction that it has over such property and dispose of it, either subject to encumbrances or free from encumbrances.

In *The Dollar Savings Bank v. United States*, 19 Wall. 233, at 239, the court said:

> "It is a familiar principle that the King is not bound by any Act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. *Magdalen College* case, 11 Coke, 74; *King v. Allen*, 15 East, 333. He may even take the benefit of any particular Act, though not named. Case of a *Fine Levied, etc.*, 7 Coke, 32; *Pott. Dwarris*, 151, 152. The rule thus settled respecting the British crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal Courts. It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution."

See also

United States v. Herron, 20 Wall. 253;
Lewis v. United States, 92 U. S. 618.

The doctrine of the above cases was recognized in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U. S. 152, wherein the United States was held subject to the bankruptcy act because named therein. The court said on pages 159 and 160:

"It will be seen, therefore, that by the statute of 1797 (now §3466) and §5101 of the Revised Statutes, all debts due to the United States were expressly given priority to the wages due any operative clerk, or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality.' These were civil obligations, not personal conventions, and preference was given to them; but as to debts, we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. *The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment.* The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants." (Italics ours)

In *In re General Film Corporation*, 274 Fed. 903 (C. C. A. 2nd Circuit) in which the question of income taxes due to the federal government was involved, the court said at page 904:

"The government's first proposition is that the only remedy open to the trustee for correcting any error is to pay the taxes and then proceed under Rev. Stat. 3226 (Comp. St. 5949) by appeal to the Commissioner of Internal Revenue and, if the Commissioner delay decision for more than six months, to bring suit. But Congress in the Bankruptcy Act of 1898 (Comp. St. §§9585-9656) has departed very considerably from the principles of public policy theretofore prevailing as to the rights of the sovereign. The Supreme Court pointed this out in *Guarantee Title & Trust Co. v. Title*

Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706.

"Section 64a of the Bankruptcy Act reads:

"'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.' Comp. St. §9648.

"We regard this section as binding upon the government because it is named therein and, while conferring priority, as giving the bankruptcy court the power to hear and determine any question that arises as to the amount or legality of a tax assessed by it. The provision applied *to taxes of all the persons mentioned*, and we could not differentiate the government from the other persons in the absence of language justifying it." (Italics ours.)

In *In re Anderson*, 279 Fed. 525 (C. C. A. 2nd Circuit), in which the trustee in bankruptcy served a motion and a petition upon the Collector of Internal Revenue for the Second District of New York, returnable before the referee, wherein the trustee prayed for an order barring and foreclosing the United States from participating in the bankrupt's estate, or in the alternative be directed to file its claim or claims on or before a day certain in order that a hearing thereon might be had in accordance with law, the United States appeared specially and moved to dismiss the trustee's petition upon the grounds that the bankruptcy Court was without jurisdiction and that service upon the Collector of Internal Revenue was not service upon the United States. These

objections were overruled, the hearing was had and the referee barred the United States from participating in the bankrupt estate, which order was affirmed upon review by the District Court. From such affirmance by the District Court the United States filed its petition to review in the United States Circuit Court of Appeals. The court said on page 529:

> "The United States must file its claim for taxes as any other creditor, if it desires to share in the estate, and the court must determine any question arising as to the amount or legality of such tax. It cannot stand by, as it did here, after permission having been granted to file its claim, and expect to subsequently collect the tax from the bankrupt or his trustee. To permit such a procedure would make it impossible to say when there could be a winding up of the bankruptcy proceedings and a distribution of the assets. The trustee may only pay out the assets under an order of the referee or the court, and without such order he could not pay the income tax owing to the government. If the government had a priority, it could be easily determined in this proceeding, and it clearly was the intention of Congress that it should be determined under the command of section 64a, where the United States is specifically mentioned. We think it was the intention to have settled promptly in the bankruptcy proceedings all matters of taxes due the United States. The Bankruptcy Act evidently does not contemplate that taxes should be proved, like an ordinary debt, providing, as it does, that they shall be paid by the trustee on order of the court, and that he shall have credit in his accounts upon filing receipts from the proper officials therefor. *In re Prince & Walter* (D. C.) 131 Fed. 546.
>
> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. * * * The court granted 10 days after the service of a copy of the order within which to move to dispute the merits of the finding of the referee below.

This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

In *In re Brezin*, 297 Fed. 300 (District Court, New Jersey), the court recognized the validity of the doctrine announced in the *Anderson* case, *supra*, but held that, because the United States was not specifically mentioned in that section of the Bankruptcy Act which provides that claims could not be proved subsequent to one year after the adjudication, the United States had the right to prove its claim after the year had expired. The doctrine in the *Anderson* case, *supra*, was likewise recognized in the cases of *United States v. Wood*, 290 Fed. 109 (C. C. A. 2nd Circuit); *In re Sheinman*, 14 F. 2nd 323 (District Court of Pennsylvania); *United States v. Bernstein*, 16 F. 2nd 233 (C. C. A. 8th Circuit). See also *Nisbett v. Trust Company*, 229 Fed. 644, 649 (C. C. A. 8th Circuit).

What is true of the sovereign United States must likewise be true of the sovereign States, for Section 104, Title 11, U. S. C. (pages 20, 21, *supra*) (Section 64 of the Bankruptcy Act) provides:

"The term 'person' as used in this Section shall include corporations, the United States and the several States and Territories of the United States * * *."

and indeed it has been so held.

In *In re Florence Commercial Co.*, 19 Fed. 2d. 468, (C. C. A. 9th Circuit), certiorari denied 275 U. S. 542, the Treasurer of Pinal County, Arizona, acting under the statutes of that state, seized a stock of merchandise of the Florence Commercial Company to enforce the payment of tax claims for the years 1921 to 1926, aggregating $9,139.34.

Five days later the Florence Commercial Company was adjudged a bankrupt and thereafter the trustee in bankruptcy filed an application with the court for a show cause order to be served upon the County Treasurer of Pinal County, Arizona, to the end that upon a hearing the validity and amount of the tax claims might be determined and the trustee in bankruptcy authorized to sell the property free and clear of liens. In reply to the show cause order the Treasurer of Pinal County, Arizona, filed a special answer in the nature of a plea to the jurisdiction of the bankruptcy court. The court, with respect to Section 104, Title 11, U. S. C., (Section 64 of the Bankruptcy Act), said, 19 Fed. 2d. 469:

> "It is not controverted that the 'court' here referred to is the bankruptcy court, and that the hearing and determination provided for are to be had, not in a plenary suit, but in a summary proceeding such as we are considering. That Congress has the power to confer the requisite jurisdiction upon the bankruptcy court is not open to doubt. *In re Wood,* 210 U. S. 246, 28 S. Ct. 621, 52 L. Ed. 1046. Has it exercised that power? In effect, if not in terms, appellants argue that the section ceases to be operative or is inapplicable where, as here, the tax-collecting agency, in proceedings to force payment, acquires possession of the taxed property prior to bankruptcy. But this view cannot be taken without reading into the general language an unexpressed exception, inconsistent with both its letter and its spirit."

In *In re Stavin,* 12 F. 2d, 471 (District Court, New York), certain wage creditors who were entitled to priority of payment were seeking to obtain the payment of their claims upon the grounds that there was sufficient money to pay their claims in full. The referee, before ordering such claims paid, desired to ascertain the amount of *taxes due to the State of New York and to the United*

States. For this purpose the referee, within five months from the date of adjudication, served upon the State of New York and the United States Government an order requiring them to file, within sixty days after the service of such order, any and all claims which they had against the bankrupt's estate. The trustee in bankruptcy thought this order was erroneous in that the year within which creditors could prove their claims had not as yet expired, with the result that the referee in bankruptcy certified the question to the District Court for review. It might be added that neither the State of New York nor the United States put in any appearance in response to the show cause order. The District Court in passing upon the question so certified to it said:

> "Under section 64a of the Bankruptcy Act (Comp. St. §9648), the bankruptcy court is required to pass upon and determine the amount and the validity of taxes claimed to be owing by the bankrupt to the state and to the United States. *In re General Film Corporation* (C. C. A.) 274 F. 903; *In re Anderson* (C. C. A.) 279 F. 525; *In re Brezin* (D. C.) 297 F. 300; *In re Wyley Co.* (D. C.) 292 F. 900. Inasmuch as this section expressly provides that the court shall order the trustee to pay such taxes 'in advance of the payment of dividends to creditors,' the intention is clear that all sums due for taxes should be promptly ascertained and determined before the first dividend is declared.
>
> "Section 65b (Comp. St. §9649) contemplates payment of a first dividend within 30 days after the adjudication, provided the estate is in funds sufficient to pay priority debts and a dividend of 5 per cent. But under section 64a taxes legally due and owing by the bankrupt must first be determined and ordered paid. For this purpose the bankruptcy court may by proper *notice bring the state and the United States before it,* to the end that claims for all taxes legally due and owing may be ascertained and their validity deter-

mined. In the *Anderson* case, *supra*, this was done by an order similar to the orders here in question. Such orders are proper, and clearly within the jurisdiction of the court in the exercise of its power under section 64a. * * *"

In *In re Prince & Walter*, 131 Fed. 546, (District Court, Pennsylvania), in which was involved the question of the proper distribution of funds derived from the sale of the bankrupt's real estate, the court said, at page 549:

"But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. *In re Veitch*, 4 Am. Bankr. Rep. 112, 101 Fed. 251. *In re Brinker* (D. C.) 128 Fed. 634; *City of Waco v. Bryan* (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, *J.*). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. *In re Keet*, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed."

Counsel for respondent no doubt will contend, as they contended below, that the only jurisdiction of the Bankruptcy Court under Section 104, Title 11, U. S. C., (Section 64 of the Bankruptcy Act), is to determine the amount or legality of the taxes, in case any question as to the amount or legality thereof arises, and that in the case at bar no question arose before the Bankruptcy Court as to the amount or legality of respondent's tax claim. The record does not disclose whether or not the legality or amount of respondent's tax claim was in any wise contested, but certainly the provisions of the Bankruptcy Act are not to be given such narrow construction, for under Paragraph (b) of the Section, the Bankruptcy Court must determine the priority of tax claims, as well as determine their amount and legality under Paragraph (a). As was said by the Court in *In re Florence Commercial Co.*, 19 Fed. 2d. 468, at 470, certiorari denied 275 U. S. 542:

> "Nor are we inclined to the narrow view that, while there may be jurisdiction to determine the amount of the tax, it does not extend to the incidental matter of the tax lien. The bankruptcy court is to see to it that the estate fully discharges all legal obligations in respect of taxes; and accordingly it is invested with power to decide all questions incidental to the performance of that duty."

It is respectfully submitted that the above authorities clearly establish the jurisdiction of bankruptcy courts to determine the priority of tax liens upon the bankrupt's real estate and to order such real estate sold free and clear thereof, transferring the liens from the property to the fund to be derived from the sale thereof, and that the Court of Appeals of Trumbull County, Ohio, erred in finding and holding that the Bankruptcy Court had no such jurisdiction. It was in the performance of this jurisdic-

tion, that the Bankruptcy Court, in the bankruptcy proceedings of The Sterling-Knight Company, probably committed error in finding that respondent's tax lien was the third lien upon the real estate of the bankrupt, and on the funds to be derived from the sale thereof. To correct this error the law provided the respondent with a remedy. Under Section 66, Title 11, U. S. C. (page 19, *supra*), (Section 38 of the Bankruptcy Act), and under General Order in Bankruptcy No. XXVII (page 18, *supra*), the respondent could have obtained a review of the rulings of the referee. He failed to take advantage of such remedy, and, it is submitted, he is now bound by the judgment of the Bankruptcy Court.

The Court of Appeals of Trumbull County, Ohio, failed to give full faith and credit to the judgment and decree of the District Court of the United States.

The District Court of the United States for the Northern District of Ohio, Eastern Division, sitting in bankruptcy, having had jurisdiction, power and authority to make the order which it did make, it was the duty of the Court of Appeals of Trumbull County, Ohio, under Section 687, Title 28, U. S. C. (page 21, *supra*), to give full faith and credit thereto. *Supreme Lodge v. Meyer*, 265 U. S. 30.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the judgment and finding of the Court of Appeals of Trumbull County, Ohio, may be reversed and the right, title, privilege and immunities claimed by petitioner under the statutes of the United States may be protected, and that to such an end a writ

of certiorari should be granted and this Court should review the decision of the Court of Appeals of Trumbull County, Ohio, and finally reverse it.

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In the Supreme Court of the United States

OCTOBER TERM 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF PETITIONER.

I—WHICH WRIT WAS PROPERLY GRANTED.

Counsel assume that the first question which this Court will desire to dispose of is as to which writ was properly granted, the one directed to the Court of Appeals of Trumbull County, Ohio, being cause No. 54, or the one directed to the Supreme Court of Ohio, being cause No. 55. Two petitions for writs of certiorari were filed (a) because counsel for petitioner were not certain as to which of the state courts this Court would hold to be possessed of the record, and (b) because, if they asked for a writ directed to the Supreme Court of Ohio, they were fearful that, if such writ were granted, they would be restricted in their argument to the question as to whether or not a constitutional question was involved, such being the only question passed upon by the Supreme Court of Ohio.

(a) Which State Court is Possessed of the Record?

The record of the proceedings had in the Court of Appeals consists of all the original pleadings and papers which had been filed in this cause, together with a transcript of docket and journal entries and the certificate of the Clerk.

Upon receiving an adverse decision in the Court of Appeals the petitioner filed in the Supreme Court of Ohio both a petition in error as of right, claiming a constitutional question to be involved, and a motion requesting the Supreme Court of Ohio to direct the Court of Appeals to certify thereto its record for review. (R. 27) Article IV, Section 2 of the Constitution of Ohio provides that the Supreme Court

> "* * * shall have * * * appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, * * *. In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse, the judgment of the court of appeals."

When filing a mtion to certify the record, one is not required to file therewith the record of the proceedings had in the Court of Appeals. Upon filing a petition in error, however, one must file therewith the record of the proceedings had in the Court of Appeals. Section 11263 of the General Code of Ohio provides:

> "With his petition plaintiff in error shall file either a transcript of the final record or a transcript of the docket and journal entries with such original papers or transcripts thereof as are necessary to exhibit the error complained of. * * *"

In the case at bar, petitioner, upon filing his petition in error in the Supreme Court of Ohio, filed therewith the

record of the proceedings had in the Court of Appeals. (R. 32) Petitioner, being then advised that respondent would file a motion to dismiss the petition in error upon the ground that no constitutional question was involved, filed a stipulation, as is common practice, to postpone the printing of the record until such motion was disposed of. (R. 32, and see Rule IV, 122 O. S. lxvii.) The Supreme Court of Ohio denied petitioner's motion for an order certifying the record and sustained respondent's motion to dismiss the petition in error filed as of right, holding that no debatable constitutional question was involved. (R. 33) The record of the proceedings had in the Court of Appeals was then returned to the Clerk of the Court of Appeals in accordance with Rule IX of the Supreme Court of Ohio which provides as follows (122 O. S. lxxii):

> "After the decision of a cause in the Supreme Court, in which a final record is not required to be made in that Court, the original papers shall be returned to the Clerk of the proper Court; when so returned, the Clerk of the Supreme Court shall seal them up and direct them to the Clerk of such Court, and forward them as said Clerk may in writing direct. If not so directed within a reasonable time, they may be sent by express."

The record and original papers having been returned to the Court of Appeals and no copy thereof having been retained by the Supreme Court of Ohio, it seems to follow that the writ of certiorari granted by this Court in cause No. 54 was properly directed to the Court of Appeals of Trumbull County, Ohio, and that the writ granted in cause No. 55 directed to the Supreme Court of Ohio was improperly granted.

> *Hodges et al. v. Snyder*, 261 U. S. 600, 601;
> *Sheehan Co. v. Shuler*, 265 U. S. 372, 375.

This conclusion, however, seems contrary to the opinion of this Court in *Matthews v. Huwe*, 269 U. S. 262. In that

case Matthews sought to enjoin the levy and collection of certain special assessments upon the ground, among others, that the same were assessed in violation of the federal and state constitutions. A petition in error filed as of right in the Supreme Court of Ohio was dismissed, as in the case at bar, because no debatable constitutional question was involved. A writ of error directed to the Court of Appeals of Hamilton County, Ohio, was granted by this Court. Upon motion to dismiss it was held that the writ was improperly granted, first, because the petitioner had not exhausted his remedies in the state courts, in that he did not file in the Supreme Court of Ohio a motion to require the Court of Appeals to certify thereto its record for review, and second, because it appeared that the Supreme Court of Ohio had passed upon the merits of the controversy in holding that the constitutional question, the only federal question involved, was not debatable, and that consequently the writ of error granted should have been directed to the Supreme Court of Ohio. The *Huwe* case is distinguishable from the case at bar in that the only federal question there presented was a constitutional one, and the dismissal of the petition in error by the Supreme Court of Ohio, upon the ground that the constitutional question was not debatable, was not merely a dismissal for lack of jurisdiction but was likewise a dismissal upon the merits. In the case at bar the alleged constitutional question, to-wit, that the Court of Appeals failed to give full faith and credit to a judgment of the court of bankruptcy, was not determinative of the merits of the controversy or the main federal question presented, which is, "does a court of bankruptcy have the power and authority to sell the real estate of a bankrupt free and clear of a tax lien claimed by the State of Ohio and County of Trumbull?"—a question which was not passed upon by the Supreme Court of Ohio. Again, in the *Huwe* case it does not appear that the record was returned to the Court of Appeals.

Counsel are of the opinion that, inasmuch as the dismissal of petitioner's petition in error by the Supreme Court of Ohio upon the ground that no debatable constitutional question was involved was not determinative of the main federal question herein presented, and inasmuch as the record was returned by the Supreme Court of Ohio to the Court of Appeals of Trumbull County, Ohio, the writ of certiorari granted by this Court in cause No. 54 to the Court of Appeals of Trumbull County was the writ which was properly granted.

Turnpike Co. v. Virginia, 225 U. S. 264, 269;
Hodges et al. v. Snyder, 261 U. S. 600, 601;
Sheehan v. Shuler, 265 U. S. 372, 375.

(b) This Court is not Restricted to the Constitutional Question Passed on by the Supreme Court of Ohio.

Should this Court determine that the writ of certiorari directed to the Supreme Court of Ohio was the writ which was properly granted, then it is submitted that this Court, in its review, is not restricted to the constitutional question raised by petitioner's petition in error filed in such court, because the real federal question involved, to-wit, the jurisdiction, power and authority of the bankruptcy court under the Acts of Congress to sell a bankrupt's real estate free from the lien of state taxes, appears in the record of the proceedings had in the state trial court and was the main question there presented.

Silver v. Silver, 280 U. S. 117, 122;
Saltonstall v. Saltonstall, 276 U. S. 260.

II—JUDGMENT OF BANKRUPTCY COURT WAS NOT VOID.

Respondent, in his brief in opposition to the petition for a writ of certiorari herein filed, contends that the judgment of the bankruptcy court was void, and that he therefore has the right to attack the same collaterally, as he is—

here doing. His right to do so, if the judgment is void, is not denied. Respondent's theory is that Section 104 of Title 11, U. S. C. (Section 64 of the Bankruptcy Act), gives a bankruptcy court the right merely to determine the legality and amount of taxes, and to order the same paid, and that when it inquires into the question of taxes for any other purpose it is exercising a jurisdiction not conferred upon it by the Bankruptcy Act. Certainly a bankruptcy court cannot order taxes paid until it has in some manner liquidated the estate and converted its assets into money. Section 1, Title 11, U. S. C. (Section 2 of the Bankruptcy Act), grants to bankruptcy courts such jurisdiction at law or in equity as it necessary to reduce bankrupt estates to money and distribute the same to those rightfully entitled thereto. In so doing the bankruptcy court must choose the method of liquidation; that is, it must determine whether it will be advantageous to the estate to administer certain property or abandon it, to sell certain property free from liens, transferring the liens to the fund to be derived from the sale thereof, or sell the same subject to liens. This right of the bankruptcy court has been held to be exclusive.

In *Isaacs v. Hobbs Tie & Timber Company*, 282 U. S. ...., 51 S. C. Rep. 270, 75 L. Ed. 332, decided February 24, 1931, the Hobbs Tie & Timber Company filed suit in a state court of Arkansas to foreclose a mortgage upon the property of one who had previously been declared to be a bankrupt by the District Court of the United States for the Northern District of Texas. The trustee in bankruptcy was named as a party defendant, and caused the case to be removed from the state court to the United States District Court for the Western District of Arkansas, where he filed an answer and in substance set up that the District Court for the Western District of Arkansas was without jurisdiction because of the bankruptcy proceedings,

alleging that the District Court for the Northern District of Texas, being the court which had declared the bankrupt a bankrupt, had exclusive jurisdiction. The District Court for the Western District of Arkansas entered a decree of foreclosure and sale providing that any surplus of the purchase money over and above the amount due the Hobbs Tie & Timber Company, plus costs, should be paid to the trustee in bankruptcy. In reversing the judgment of the District Court this Court said:

> "Thus, while valid liens existing at the time of the commencement of the bankruptcy proceedings are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to *decree their method of liquidation.*" (Italics ours.)

In *Straton v. New*, 282 U. S. ...., 51 S. C. Rep. 465, 75 L. Ed. 617, decided April 20, 1931, the bankruptcy court enjoined certain commissioners appointed by the state court of West Virginia from proceeding with the sale of certain real estate of the bankrupt to enforce liens thereon which had been acquired in the state court more than four months prior to the institution of bankruptcy proceedings. In speaking of the jurisdiction of the bankruptcy court this Court said:

> "It may inquire into the validity of liens, *marshal them and control their enforcement and liquidation.*" (Italics ours.)

In the exercise of this exclusive jurisdiction, and in marshalling liens, the bankruptcy court must of necessity determine the priority of the respective lien claimants, including the taxing authorities of both federal and state governments. Thus in *In re Alamac Operating Corporation*, 42 F. 2d 120 (C. C. A. 2d Circuit 1930), the bankruptcy court denied the claim of the State of New York for priority on account of a license tax under Section 104(b)(6) and awarded priority under Section 104(b)(7). In

In re Monroe Lumber & Supply Company, 36 F. 2d 1003 (D. C. M. D. Pa. 1929), corporation loan taxes due the Commonwealth of Pennsylvania, which had been settled and approved prior to the adjudication in bankruptcy, were given a priority in payment, while those taxes which had not been settled and approved until after adjudication were denied priority in payment. In *City of Chelsea v. Dolan*, 24 F. 2d 522 (C. C. A. 1st Circuit 1928), certiorari denied 277 U. S. 606, taxes due the City of Chelsea were denied priority over wage claims, though the bankruptcy proceedings had been instituted prior to the 1926 amendment to Section 104, no order of distribution having been made until subsequent to the time that the 1926 amendment took effect.

In *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205 (1912), a surety for a bankrupt public contractor filed a suit in equity in the Circuit Court seeking an adjudication of certain claims against the bankrupt and a determination of their priority. Mr. Justice Van De Vanter said, page 218:

> "These matters are rightly subjects for proceedings in bankruptcy, and therefore fall within the *exclusive jurisdiction of the court of bankruptcy.* A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks." (Italics ours.)

See also *Supply Co. v. Dattle*, 44 F. 2d 159 (C. C. A. 3rd Circuit 1930).

In exercising this jurisdiction, decreeing the method of liquidation and determining the priority of lien claimants, errors are bound to occur. But this fact detracts not one iota from the jurisdiction, power and authority of the bankruptcy courts. To correct such errors the bankruptcy law affords a remedy, to-wit, the filing of a petition to review the findings of the referee. A case substantially on all fours with the present case is that of *In re De Angeles*, 36 F. 2d 218 (C. C. A. 10th Circuit 1929). In this case the Treasurer of Carbon County, Utah, filed with the referee in bankruptcy an unverified statement of taxes due from the bankrupt. The trustee, believing that the County had no claim for such taxes, reported his opinion to the referee, who sent notices to the creditors, including the Treasurer of Carbon County, in which he stated that a meeting would be held on September 27, 1926, to consider the matter of taxes claimed by Carbon County. No one representing Carbon County appeared at the meeting on September 27, 1926, and the referee entered an order disallowing its claim for taxes. On March 24, 1928, a petition to review was filed by Carbon County, setting forth that it had not been represented at the meeting of September 27, 1926, and had not been advised of the disallowance of its claim for taxes until March 20, 1928. The District Court dismissed the petition to review upon the ground that it had not been filed within a reasonable time. In affirming this order of dismissal the Circuit Court said:

> "The referee has authority, however, to examine tax claims and to pass upon their validity and amount. * * * Hence, the notice of September 2, 1926, that the referee proposed to consider taxes claimed by Carbon County was notice to the County that the referee proposed, under Section 64(a), to inquire into the validity and amount of the taxes claimed. It is true that the County alleges it had no notice of any objection to its

claim to taxes. It may have been entitled to reasonable notice of the objections urged, prior to the hearing, but the failure to serve notice of such objections was no excuse for Carbon County's failure to appear at the hearing. Its failure to ascertain the result of the hearing on its tax claim was due to its own neglect and affords no ground for its delay, for a period of more than fifteen months, to take any steps to secure a review of the referee's decision."

In *Fierman v. Seward National Bank*, 37 F. 2d 11 (C. C. A. 2d Circuit 1930), the court said, on page 13:

"It is elementary that the Pennsylvania bankruptcy court had jurisdiction to collect and distribute the estate of the Pennsylvania bankrupt, the Hardwood Company. When the bankrupt's property was sold free of liens, the liens upon the property became rights against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was. See *In re Rochford*, 124 F. 182 (C. C. A. 8); *In re Kohl-Hepp Brick Co.*, 176 F. 340 (C. C. A. 2); *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327. Hence the bank, claiming ownership of the bonds, very properly intervened in the Pennsylvania proceedings, at first to prevent the destruction of its lien by the proposed sale, and later to reach the substituted fund. Indeed, no other course was open to it, if it wished to realize anything upon its collateral security."

To the same effect see *Delahunt v. Oklahoma County*, 226 F. 31 (C. C. A. 8th Circuit 1915), wherein a parcel of real estate was sold for less than taxes which, by state statutes, were a permanent lien thereon.

The court of bankruptcy, being thus vested with exclusive jurisdiction to determine the method to be pursued in liquidating the bankrupt's estate in marshalling liens thereon and determining the priority of the respective lien claimants, including the taxing authorities of both federal and state governments, had the right in the instant case

to order a sale of the real estate of The Sterling-Knight Company, free and clear of liens, including the tax lien claimed by respondent as Treasurer of Trumbull County, Ohio. Such order was but the adoption of one of the many methods of reducing the bankrupt's estate to cash and, under the authorities above, can not in any wise be said to be void or lacking in authority under the Bankruptcy Act.

Respondent further contends that the bankruptcy court was without jurisdiction to transfer his lien for taxes from the property to the fund to be derived from the sale thereof because of the provisions of Section 5671 of the General Code of Ohio, which provides as follows:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. * * *"

By virtue of this statute respondent says that all taxes are a permanent lien upon the real estate against which they are assessed, which lien is perpetual and can be removed only by payment in full or by one of the methods prescribed by the Sovereign State of Ohio. This is tantamount to saying that the state can deny to a federal court of bankruptcy a jurisdiction conferred upon such court by the federal bankruptcy act. Such position cannot, it is submitted, be maintained. *International Shoe Co. v. Pinkus*, 278 U. S. 261; *New Jersey v. Anderson*, 203 U. S. 484. In *Mason v. United States*, 260 U. S. 545, (1923), Mr. Justice Sutherland said:

> "Subject to certain exceptions, the statutes of a state are binding upon the Federal courts sitting within the state, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, 44 Sup. Ct. Rep. 75. That juris-

diction is conferred by the Constitution and laws of the United States and must be the same in all the states. *Neves v. Scott*, 13 How. 268, 14 L. ed. 140."

When a court of bankruptcy takes possession of the bankrupt's property, which it most certainly has the jurisdiction to do, such property is withdrawn not only from the jurisdiction of all other courts, federal and state, but it is likewise withdrawn from the jurisdiction of any and all other executive or administrative officers of the federal and state governments. Thus in the case of *Dayton v. Standard*, 241 U. S. 588 (1916), wherein state authorities sold certain real estate for taxes notwithstanding the pendency of bankruptcy proceedings, and the question arose as to the validity of the title of the purchasers, Mr. Justice Van De Vanter said, on page 589:

> "This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon. Thus far there is no room to complain."

In *Ex parte Tyler*, 149 U. S. 164, wherein a state officer levied a tax warrant upon property in the hands of a receiver of the federal court, the court said:

> "The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated

upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

In *Mercantile Trust Co. v. Tennessee Central R. Co.*, 294 F. 483 (C. C. A. 6th Circuit, 1923), the court said, on page 488:

"It is further claimed on behalf of the petitioner that, even if the decree of sale did not so provide, the Tennessee statute in reference to the payment of taxes whenever real estate is sold under decree of court establishes a rule of property obligatory upon the federal courts. This statute (Acts Tenn. 1871, c. 68, p. 59) is directed specifically to sales of real estate 'under a decree of any court in the state' and imposes duties upon the judge of the state court that the Legislature of a state cannot impose upon federal judges. *Railway Co. v. Vickers*, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; *Dodge v. Tulleys*, 144 U. S. 451, 457, 12 Sup. Ct. 728, 36 L. Ed. 501; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Bein v. Heath*, 53 U. S. (12 How.) 168, 13 L. Ed. 939.

"The federal courts are vested with full equitable jurisdiction and discretion to fix the terms of sale and impose conditions in the decree confirming the sale, and this equitable jurisdiction must be exercised uniformly throughout the United States. This equitable jurisdiction can not be limited or controlled by a state Legislature. *Gamewell Fire Alarm Tel. Co. v. City of New York* (C. C.) 31 Fed. 313; *U. S. v. Howland*, 17 U. S. (4 Wheat.) 108, 4 L. Ed. 526."

In *Murphy v. John Hofman Co.*, 211 U. S. 562, at 568, the Court said:

"But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdic-

tion of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, *though it is not authorized by any statute.* The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College,* 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver has no right to deliver it to him without the order of the court. *Whitney v. Wenman,* 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778." (Italics ours.)

Moreover Section 5671 of the General Code of Ohio must be read in the light of other provisions of the Ohio Code providing for the enforcement of the state's lien for taxes. Thus, Section 2667 of the Ohio Code provides:

> "When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

Construing this Section, the Court of Appeals for Cuyahoga County, Ohio, on June 1, 1931, in the case of *Cook, County Treasurer v. Pomozi,* 35 O. L. B. & Rep. 50, held that the Court of Common Pleas had the authority to con-

firm a tax sale of premises free and clear of liens, even though the sale was for an amount less than the amount of taxes owing. Section 5692 of the General Code of Ohio provides:

> "When land so held by tenants in common are sold upon proceedings in partition, or taken by the election of any of the parties to such proceedings, or real estate is sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order the taxes and penalties, and the interest thereon against such lands, to be discharged out of the proceeds of such sale or election."

This Section has likewise been construed as giving the courts all the power and authority necessary to discharge the lien for taxes out of the proceeds of any judicial sale. *Ketchum v. Fitch,* 13 O. S. 201; *Hoglen v. Cohan,* 30 O. S. 436; *Markley v. Whitmore,* 61 O. S. 587. The identical question raised by respondent was raised in the case of *In re Prince & Walter,* 131 F. 546 (D. C. Pa.), in which the court said, on page 549:

> "But it is urged that by the thirty-second section (page 375) of the act the taxes are made a continuing lien on the property, notwithstanding a sale, unless the proceeds are sufficient to pay them, and that they should not fare any differently or better in the bankruptcy court than they would elsewhere, and should therefore be left to be worked out against the property in the hands of the purchaser; the municipalities to which they are due being abundantly secured thereby. In *re Veitch,* 4 Am. Bankr. Rep. 112, 101 Fed. 251. In *re Brinker* (D. C.) 128 Fed. 634; *City of Waco v. Bryan* (C. C. A.) 127 Fed. 79 (dissenting opinion of Shelby, J.). But it is not correct to assume that the lien of the taxes continues notwithstanding the sale which has been made. No doubt they would if the matter was regulated purely by the state law. But notwithstanding what has been said above about liens being unaffected by bankruptcy proceedings, it is in

the power of the court to order a sale free and clear of them, regardless of how they would ordinarily stand. In *re Keet*, 11 Am. Bankr. Rep. 117, 128 Fed. 651. And the court having undertaken to administer upon the real estate in the present instance, and directed a sale subject to the lien of the first mortgage, all others were thereby divested; and any one who purchased upon the faith of this, as disclosed by the record, took a clear title, on which nothing further can be imposed."

See also *Isaacs v. Hobbs Tie & Timber Company, supra*, and *Straton v. New, supra.*

The cases of *Security Trust Co. v. Root*, 72 O. S. 535, and *Stokes v. Georgia*, 42 Ga. 412, do not support respondent's contention. In *Security Trust Co. v. Root* the question arose as to whether the holder of a tax title, procured during the pendency of foreclosure proceedings, had superior title to the purchaser at a subsequent foreclosure sale. The court held that the holder of the tax title was by statute subrogated to the rights of the state, that the issuance thereof was a matter of record and that the holder thereof, *not having been made a party to the foreclosure proceedings*, had the superior title. In *Stokes v. Georgia* the Supreme Court of Georgia held that the purchaser at bankruptcy sale, free and clear of encumbrances, did not procure a title free of taxes, *because the state of Georgia had not been made a party to the bankruptcy proceedings.* Such a situation is entirely different from that in the case at bar in that in the case at bar respondent was made a party to the proceedings in the bankruptcy court and he there set up the same lien which he now seeks to assert. In the recent case of *Baldwin v. Iowa State Travelling Men's Association*, 282 U. S. ...., 51 S. C. Rep. 517, 75 L. Ed. 667, decided May 18, 1931, Mr. Justice Roberts said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters

once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

In the case at bar respondent, in compliance with a notice sent him by the bankruptcy court, filed in the bankruptcy court his claim for taxes. The bankruptcy court found such taxes to be a third lien upon the bankrupt's real estate and ordered the same to be transferred from the real estate to the fund to be derived from the sale thereof and ordered the real estate sold free and clear of respondent's lien. If respondent was aggrieved by such order, he had a right to file a petition in the District Court for a review of the same. Not having done so, it is submitted that he cannot now successfully assert that he has a lien on such real estate, particularly in view of the fact that petitioner, in purchasing such real estate, purchased the same relying upon the order of the bankruptcy court, made in a proceeding to which respondent was a party, that the same was free and clear of respondent's lien. In *Lesser v. Gray*, 236 U. S. 70 (1915), the bankruptcy court disallowed a claim against a bankrupt partnership arising out of a contract for the future delivery of cotton bagging. The reason assigned by the referee was that an implied condition of the contract terminated it when involuntary bankruptcy proceedings were instituted and that no legal injury resulted. After a discharge in bankruptcy had been granted the partners, suit was instituted against them in the state court for damages arising out of the breach of the same contract. Upon demurrer such suit was dismissed. Error being prosecuted to this Court, Mr. Justice McReynolds said:

"The petition in the cause now under review was properly dismissed. If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach, and defendant Gray became liable for any resulting damage; but he was released therefrom by his discharge. In this state of the record we will not enter upon a consideration of the specific reason assigned by the state court for sustaining the demurrer. *No effort was made by plaintiff in error to secure a review of the action of the bankruptcy court in the direct way prescribed by the statute, and that result may not be obtained indirectly through the present proceeding.* The judgment of the court below is affirmed." (Italics ours.)

It is respectfully submitted that respondent is bound by the order of the bankruptcy court and that he now has no lien upon or claim to the real estate of petitioner for taxes for the years 1924, 1925, 1926 and 1927; that the judgments of the Supreme Court of Ohio and of the Court of Appeals of Trumbull County, Ohio, should be reversed and final judgment entered in this cause for petitioner, quieting his title to the real estate described in his petition against the claim of the respondent for taxes for the years 1924, 1925, 1926 and 1927.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

v.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO.

REPLY BRIEF OF PETITIONER.

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Due to certain questions raised for the first time by respondent in his supplemental brief, counsel for petitioner file this their reply brief.

I.

A PLENARY SUIT WAS NOT NECESSARY OR REQUIRED.

It is claimed in the supplemental brief of respondent that the Bankruptcy Court never acquired jurisdiction over the person of the respondent, first, because there is no provision in the Bankruptcy Act providing for the mailing of notice respecting the filing of a petition for authority to sell real estate and marshal liens thereon, and second, be-

cause a proceeding to determine the priority of liens is a plenary proceeding. These questions are here raised for the first time and it is submitted that they are wholly without merit.

By Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act), creditors are entitled to ten days' notice by mail of all proposed sales of property, and it is claimed that this does not authorize a notice by mail of the filing of a petition for an order to sell, free and clear of liens, and to marshal the liens upon the property. The argument must fall of its own weight, for certainly a petition by a trustee for an order to sell is one to make "a proposed sale," and it is necessary for such petition to be complete that it ask for a sale either subject to incumbrances or free from incumbrances, and, if free from incumbrances, that the same be marshalled and their priority determined. Consequently, the fact that such petition asks for an order marshalling liens and authorizing the sale of the property free and clear of liens, in no wise detracts from the fact that the petition is one for "a proposed sale."

At the time the application was filed notice was given to all creditors of the hearing to be had upon such application (R. 20), and in addition thereto *lien claimants named as parties defendant* in such application were given a specific notice (R. 21), part of which read as follows:

> "Unless your interest is set up by proper pleading at or prior to said hearing, an order will be entered finding that you have no lien." (R. 22.)

Both of these notices were received by the respondent (R. 22) and in response thereto he mailed to the Referee a statement of the taxes due upon the real estate herein involved. He thus submitted himself to the jurisdiction of the court without objection. The fact that neither the respondent nor his counsel, the Prosecuting Attorney, ap-

peared at the hearing, paid no further attention to the proceedings, and had no actual knowledge of the findings of the Bankruptcy Court, determining the priority of liens, until some eight months afterward (R. 23), does not detract one iota from the fact that the respondent submitted himself to the jurisdiction of the court and that the court had jurisdiction to enter the order which it made.

The argument advanced that a proceeding to determine priority of liens is a plenary proceeding is equally groundless. The respondent never had possession of the real estate in question but, as found by the Court of Appeals (R. 19), the bankrupt was the owner and was in possession on the very day it was declared a bankrupt, and naturally the Trustee in Bankruptcy succeeded to the bankrupt's title and possession. That a plenary suit is not necessary where the Bankruptcy Court has possession of the *res* is well settled. In the case of *Taubel-Scott-Kitzmiller Co. v. Fox*, (1924) 264 U. S. 426, wherein the bankruptcy court, by summary process, attempted to dispossess a sheriff of the bankrupt's property, which the sheriff had seized under a writ of execution issued upon a judgment obtained within four months of bankruptcy, but at a time when the bankrupt was still solvent, Mr. Justice Brandeis said, on pages 433 and 434:

> "Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision c of §67, under subdivision b of §60, and under subdivision e of §70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

To the same effect see *First National Bank v. Chicago Title & Trust Co.*, (1905) 198 U. S. 280; *Whitney v. Wenman*, (1905) 198 U. S. 539.

The cases of *Ray v. Norseworthy*, 90 U. S. 128, and *Factors & Traders Insurance Co. v. Murphy*, 111 U. S. 738, and *In re Henderson*, 206 Fed. 139, are not authorities in favor of respondent's position that a proceeding to determine the priority of liens, where the bankruptcy court is in possession of the property is a plenary proceeding. These cases are merely to the effect that a lien claimant cannot be dispossessed of his lien without notice. In the case of *Ray v. Norseworthy, supra*, the court said:

> "Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts and circumstances which it is supposed justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests and, consequently, must be properly notified and summoned to appear for that purpose. *Foster v. Ames*, 1 Low. 316; *Willard v. Brigham*, 25 La. Ann. 601.
>
> "None of these conditions were fulfilled in this case. Instead of that the State Court finds that the petitioner was never properly notified and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State Court decided that his rights were unaffected by the proceedings."

In the case at bar the Court of Appeals in its Finding of Fact No. 4 (R. 20) specifically found that, upon the filing of the petition to sell, the Referee "in the manner

and form as provided by the Bankruptcy Laws of the United States mailed to all known creditors" notice of the filing thereof and of the date set for hearing the same. Further, that, upon the filing of such petition, the Referee "mailed to those named as claiming any lien upon the property" an additional notice, to which was appended the following:

> "Unless your interest is set up by proper pleading at or prior to said hearing an order will be entered finding that you have no lien." (R. 22.)

The Court of Appeals further found that the notices so mailed were received by the respondent, "who, upon receipt thereof, mailed to the Referee a statement of the taxes due." Thus, in the case at bar the state court expressly found that the respondent had been notified "in the manner and form as provided by the bankruptcy laws of the United States." It is thus apparent that the respondent had due opportunity to defend his interest, and that he failed so to do is no excuse for the situation in which he now finds himself. *In re De Angeles,* 36 Fed. 2d. 218 (C. C. A. 10th Circuit 1929).

Moreover, even though a proceeding to determine the priority of liens were to be classed as a plenary proceeding, respondent, having been notified of the summary proceedings taken and having filed in response to such notice his statement of taxes due without objecting to the character of the proceeding, cannot now be heard to complain that the proper procedure was not adopted. *In re Rockford Produce & Sales Co.,* 275 Fed. 811 (C. C. A. 7th Circuit 1921); *Board of Trade v. Johnson,* 283 Fed. 374 (C. C. A. 7th Circuit 1922); *In re Hollingsworth & Whitney Co.,* 242 Fed. 753 (C. C. A. 1st Circuit 1917).

It is further claimed on behalf of respondent that he is purely a ministerial officer of the State of Ohio and

that the State of Ohio cannot be sued except in cases specifically authorized by statute. While this is true, it is equally true that the respondent is the person charged by the laws of the State of Ohio with the collection of taxes due, he is authorized to sue and be sued; and in proceedings instituted for the collection of taxes it is not necessary that the State be made a party thereto but the State shall "be deemed a party through and represented by the County Treasurer." (See Statutes of the State of Ohio set forth in Appendix A hereof.)

A similar question was raised by the Collector of Internal Revenue in the case of *In re Anderson*, 279 Fed. 525, wherein it was contended that service of a show cause order upon the Collector of Internal Revenue was not the equivalent of service upon the United States. The court said:

> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. The notice of lien against all the property and rights of property belonging to the bankrupt was filed in the office of the clerk on July 6, 1920, and was recorded. The claim of the United States thus became a public record of which the trustee had to take notice. Notice of hearing on the petition was given to the collector, so that the United States might have opportunity to establish its claim. The official charged with the duty of collecting taxes is the collector of internal revenue, and it was he who filed a claim. It is he who serves notices upon delinquents and receives all payments under Revised Statutes, §§3183, 3184 (Comp. St. §§5905, 5906), and it is he who distrains and sells upon the distress. Section 3187 (Comp. St. §5909). All the duties devolving in such proceeding are those of the collector of internal revenue. He is the proper person to be notified to be brought into court on a proceeding such as the one instituted below. The court granted 10 days after the

service of a copy of the order within which to move to dispute the merits of the finding of the referee below. This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

Respondent in the case at bar occupies identically the same position with relation to the State of Ohio as that occupied by the Collector of Internal Revenue in his relation to the United States. What is true of the Collector of Internal Revenue under such circumstances must be equally true of the respondent. Carrying it to the logical limit, the suggestion of counsel for respondent would seem to deny the right of the referee to call the taxing authorities into his court for any purpose. If this be true, by what process can the taxes be ordered paid and the estate closed?

The contention of the respondent that there is only one method authorized for attacking taxes in Ohio, and that that method is to be found in Section 12075 of the General Code of Ohio, is also erroneous. Section 12075 provides as follows:

"Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Petitioner could not file any suit to enjoin a levy of the taxes here involved for the reason that they had been levied in the years 1924, 1925, 1926 and 1927, prior to the bankruptcy proceedings of The Sterling-Knight Company and prior to the time that the petitioner acquired title to the premises in question. Petitioner was not entitled to

enjoin the collection of such taxes for the reason that the Treasurer had a perfect right to collect the same from the bankrupt estate of The Sterling-Knight Company. Petitioner's only remedy was to enjoin the respondent from asserting any lien upon the premises in question for taxes which he claimed to be due for the years 1924, 1925, 1926 and 1927, a remedy which is obtained through the filing of a suit to quiet title. Moreover, the Supreme Court of Ohio in the recent case of *Conn v. Jones,* 115 O. S. 186 (1926), found and determined that the remedy provided for in Section 12075 was not exclusive but was cumulative to other remedies provided for by law.

II.

PETITIONER IS AN INNOCENT HOLDER FOR VALUE.

In respondent's brief it is contended that the petitioner is not an innocent holder for value inasmuch as the taxes, the lien of which is here in dispute, remained unpaid on the tax duplicate of Trumbull County, which was a public record of which petitioner was bound to take notice. The record of the proceedings had in the bankruptcy of The Sterling-Knight Company in the District Court of the United States for the Northern District of Ohio, Eastern Division, was likewise a public record of which petitioner was bound to take notice. In the latter public record it was disclosed that the lien of the respondent for the taxes here in question had, by order of the Bankruptcy Court, been removed from the premises in question and transferred to the funds to be derived from the sale thereof. It was upon this public record that the petitioner relied in accepting a deed to the premises, subject to taxes only for the year 1928 and thereafter, and he did not choose to rely solely upon the warranty of his grantor.

On pages 8 and 9 of respondent's brief attention is called to the fact that the premises here in question sold

for less than the amount even of the first mortgage, to say nothing about taxes and other liens, and that out of the proceeds of the sale of the mortgaged property $19,171.46 was applied to the payment of the costs of administration, and it is stated that the practice in bankruptcy courts is, where real estate is of less value than the encumbrances, to abandon the property and that that is what should have been done in the instant case; that the costs of administration were paid and the proceeds of the sale of the mortgaged property were distributed long before the respondent "learned anything of the attempt to avoid the payment of the taxes due the State of Ohio." It seems that the inference respondent desires us to draw from this argument is that the mortgage holders attempted in some way to avoid the payment of the taxes here in question. No such argument or contention was made in the courts below, and should this Court feel that there is any merit in such contention the record can be diminuted to show that the same is wholly without merit, for the record below, based upon which the Court of Appeals of Trumbull County made its findings of fact, shows that The Union Trust Company, Trustee, first mortgagee, The Old Dominion Mortgage Company, second mortgagee, and The Second National Bank of Warren, pledgee of the mortgage of The Old Dominion Mortgage Company, all answered the Trustee's petition to sell, requesting in their answers that the property be abandoned for the reason that there was no equity therein for general creditors. Notwithstanding such answers and the position of the mortgagees therein taken, the Referee in Bankruptcy ordered the Trustee in Bankruptcy to sell the premises, free and clear of all encumbrances.

It is perfectly true that the purchase price of $75,000.00 was, at the bankruptcy sale, paid in first mortgage

bonds with no money changing hands, and that the expenses of such sale were paid out of the proceeds of the sale of mortgaged personal property belonging to the same lien claimants, from the sale of which was realized $96,527.30. Had the Referee in Bankruptcy found that the taxes were a first lien upon the property, or had his finding that they were a third lien been reversed upon petition to review, the first mortgagee, who bid the property in at bankruptcy sale, would have had to pay the amount of those taxes in cash. An order to that effect made by the Referee or the reviewing court would have been binding upon the purchaser-mortgagee. Moreover, this argument is one which might perhaps be made if this action were one between the mortgagees and the respondent. The action, however, is not one between the mortgagees and the respondent but is between the respondent and a purchaser from the mortgagee, who in purchasing relied upon an unreversed, unmodified judgment of the Bankruptcy Court in a proceeding to which respondent was a party, in which he appeared and set up his claim, and in which it was ordered that the lien which respondent now seeks to assert against the premises in question be transferred from such premises to the funds to be realized from the sale thereof, and of which funds there were ample if he had chosen to follow them.

III.

THE BANKRUPTCY COURT DID HAVE JURISDICTION TO TRANSFER THE LIEN OF THE STATE FOR TAXES FROM THE PROPERTY TO THE FUND TO BE DERIVED FROM THE SALE THEREOF.

In respondent's supplemental brief upon this point but one additional argument is advanced in favor of his position that the Bankruptcy Court did not have power to transfer his lien for taxes from the property to the fund to be derived from the sale thereof, and that is that the Bankruptcy Act in all of its provisions assumes to protect the taxes due the sovereign states and that these taxes are not affected by a discharge in bankruptcy. True it is that the Bankruptcy Act in all its provisions assumes to protect the taxes due to the sovereign states, but in the case at bar respondent did not see fit to avail himself of the provisions of the Bankruptcy Act enacted for the purpose of protecting the same. In other words, the Bankruptcy Court was not without jurisdiction. At most it committed an error in holding the lien of the respondent to be a third lien upon the premises in question. Such a finding could have been corrected under the provisions of the Bankruptcy Act, had respondent given any attention to the proceedings had before the Referee, of which he was notified and in which he appeared and set up his claim. Having contented himself merely with the filing of his claim and not having seen fit to pay any further attention to the proceedings, he most certainly is not now in a position to complain. While the obligation to pay taxes assessed upon real property may not be affected by a discharge in bankruptcy, there is nothing in the Bankruptcy Act which forbids the Bankruptcy Court, with all interested parties before it, from transferring the lien of such taxes from the property of the bankrupt to the fund to be derived from the sale of such property, thereby discharg-

ing the *property* from the lien thereof. That the Bankruptcy Court has such power seems clear from the statutes and authorities to which attention has heretofore been called.

Respectfully submitted,

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APPENDIX A.

The following Sections of the General Code of Ohio show that the respondent is the officer who by law is charged with the duty of collecting taxes, and that he can both sue and be sued:

"§2658. *Collection of overdue taxes by distress.* —When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and the place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

"§2660. *Proceedings when unable to collect taxes by distress.*—If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, which rule shall have the same force and effect as a judgment at law and shall be enforced by attachment or execution or such process as the court directs."

"§2667. *Action by treasurer for unpaid taxes or assessments.*—When taxes or assessments, charged

against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

"§2669. *Petition and evidence.*—Having made the proper parties, it shall be sufficient for the treasurer to allege in his petition that the taxes and assessments, or either, are charged on the tax duplicate against such premises, the amount thereof, and are unpaid, and he shall not be required to set forth in the petition any other or further special matter relating thereto. On the trial a certified copy of the entry on the tax duplicate, shall be prima facie evidence of such allegations and of the validity of such taxes and assessments."

"§2670. *Judgment and decree.*—Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, *it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer.*" (Italics ours)

"§5674. *Collection of tax of transient trader.*—When the county auditor certifies to the county treasurer the amount of tax assessed upon a return made

by or for a transient trader, under chapter three of this title, the treasurer shall forthwith enter it upon the duplicate and notify such trader of the amount assessed. If he neglects or refuses to pay the amount within twenty-four hours after receiving such notice, the treasurer shall collect it by any process or proceeding authorized in a case of delinquent personal property tax."

"§5695. *Collection of taxes.*—The county treasurer shall forthwith *collect* the taxes and penalty on the duplicate *by any of the means provided by law*, and the funds so collected shall be distributed in proper proportions to the appropriate funds." (Italics ours)

"§5697. *How treasurer to collect delinquent personal tax.*—When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid thereon, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto."

"§5700. *When county officer allowed counsel.*—When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the

public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages, and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

"§5701. *County solicitor to attend such suits.*—In each county in which there is a county solicitor, or a board of control having a solicitor, the county solicitor and the solicitor of such board shall take charge of and attend to all actions against any county officer in such county for performing, or attempting to perform, any of the duties authorized by law. Such officers shall not employ any other counsel to defend such action or suit."

Under this section in *Brewster v. Anderson*, 1 O. C. C. 268, it was held that appearance for officers in tax recovery may be entered by the County Solicitor.

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CHARLES ELMORE C

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. [illegible] 55

L. J. VAN HUFFEL,

Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT
Opposing Petition for a Writ of Certiorari.

G. H. BIBBELL, *Prosecuting Attorney,*
Trumbull County, Ohio,

GEO. W. SECREST, *Assistant Prosecuting Attorney,*

Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 907.

I. J. VAN HUFFEL,

Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,

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Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 907.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT
Opposing Petition for a Writ of Certiorari.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The brief of the respondent, Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, is herewith submitted for the consideration of this Honorable Court:

I.

SUMMARY STATEMENT OF POINTS OF FACT AND OF LAW.

In the matter of the Sterling Knight Motor Co., Bankrupt, pending in the United States District Court for the Northern District of Ohio, Eastern Division, the trustee in bankruptcy filed his petition to marshal the liens against certain real estate belonging to the bankrupt, situated at Warren, Trumbull County, Ohio, praying for an order to sell the real estate free and clear of encumbrances and that the liens be transferred to the funds arising from the sale.

In this proceeding, the Treasurer of Trumbull County, Ohio, was named a party defendant, a notice of the pendency of the action was mailed to him, and thereafter he mailed to the referee in bankruptcy a statement of the taxes appearing on his records, but he did not enter any further appearance nor was he present at any of the hearings before the referee, in person or represented by counsel.

The referee ordered the property sold free and clear of encumbrances and transferred the liens against the property to the fund arising from the sale. In his decree the court found that the taxes were correct in amount and legally assessed, but that the lien of the State of Ohio and Trumbull County for such taxes against the real estate was a third lien and subsequent to the liens of both the first and second mortgages.

The property was subsequently sold pursuant to the order of the referee, and was purchased at the sale by The Union Trust Company of Cleveland, Ohio, as Trustee for the first mortgagee, for an amount much less than the value of its mortgage, which mortgage was set off against the purchase price so that no fund was created

from which the taxes could be paid. No proceedings were brought by the Treasurer to reverse the finding of the referee for the reason that he did not know of the finding until the time for instituting error proceedings had expired. Subsequent to the sale and purchase, The Union Trust Co., Trustee, conveyed the premises to a holding company, The Warren-Cleveland Company, which in turn conveyed by warranty deed to I. J. Van Huffel, the petitioner in this cause.

The taxes remaining unpaid upon the records of the Treasurer of Trumbull County, the petitioner brought this action in the Common Pleas Court of Trumbull County to quiet his title against the claim of the respondent for taxes, who by way of answer set forth the fact that the taxes in question appeared upon his records unsatisfied and unpaid, and prayed for the dismissal of the petition. By way of reply, petitioner set forth the proceedings in the bankruptcy court contending that, by virtue of the decree of that court from which error was not prosecuted, the matter was adjudicated by a Court of competent jurisdiction having jurisdiction of the subject matter and the person.

The foregoing is but a brief general statement of the facts involved, a detailed statement being found in the finding of fact by the Trumbull County Court of Appeals on page 19 of the Record.

II.

ARGUMENT.

I. Did the Bankruptcy Court, without making other provisions for the payment of the taxes in question, have jurisdiction to issue its decree divesting the State of Ohio and Trumbull County of their lien for taxes against the real estate of the bankrupt, where such taxes have been legally and lawfully assessed and made a permanent lien by the laws of the State of Ohio until paid or otherwise discharged by law; or is such a decree, which in effect destroys the right of the State and County to collect such taxes, in excess of the jurisdiction of the Bankruptcy Court thereby rendering such decree void and open to collateral attack?

The statement of the proposition of law involved, on page 22 of the petitioner's brief, is misleading to the Court by reason of the fact that it is not comprehensive of the whole situation. The sole question there presented is whether the Court of Bankruptcy could order the real estate of the bankrupt sold free and clear of the lien of the State of Ohio and Trumbull County for taxes and transferring such lien from the real estate to the fund derived from the sale thereof. This omits entirely from consideration that part of the decree which made the lien of the State subsequent to that of the first and second mortgages which in effect, not only transferred the lien of taxes to the fund arising from the sale, but in effect destroyed the lien which was intended to be made permanent by the laws of the State until paid.

The first point raised is as to the jurisdiction of the Court of Appeals to inquire collaterally into the validity of the judgment rendered by the Federal Court in the bankruptcy proceedings of the Sterling-Knight Motor

Company. The doctrine that a judgment in a case, of which the Court has once acquired jurisdiction, cannot be collaterally assailed is only correct where the Court proceeds, after acquiring jurisdiction, according to the established modes governing the class to which the case belongs; and does not transcend, in the extent or character of its judgment, the law which is applicable to it. Where the Court transcends the limits of its authority, its judgment is not merely erroneous but is entirely void:

> "Although a court may possess jurisdiction of a cause of the subject matter and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judiciously in all things, and cannot then transcend the power conferred by law."
>
> *Windsor v. McVeigh*, 93 U. S. 274-282, 23 L. Ed. 917.

The consequences of a void judgment are found in *Black on Judgments*, Second Edition, Vol. 1, Section 170, page 248, where the following language appears:

> "Now a 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported

by no presumptions, and may be impeached in any action, direct or collateral."

In that text reference is also made to a decision of the Supreme Court of the United States, where, in the case of *Elliot v. Peirsol*, 1 Pet., 328, at 340, 7 L. Ed., 164, the Court said:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not avoidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

From these decisions, and there are many others, for the question is elemental, it appears that a judgment rendered by a Court in excess of the jurisdiction conferred is absolutely void, and a nullity with no force and effect whatsoever, which judgment may be impeached in any proceedings whether direct or collateral.

The next question to be raised concerns the jurisdiction of a Court of Bankruptcy, with respect to the lien of the State and County for taxes.

Generally speaking, the origin of the Courts of Bankruptcy is statutory and they have no further powers or jurisdiction than is specifically conferred on them, or necessarily implied from the statutes creating them. That is to say, their jurisdiction is limited, and their judgments possess only those attributes of finality which are acquired through the exercise of the statutory jurisdiction conferred upon them:

Elmira Steel Co. (D. C., N. Y.) 5 Am. B. R. 484, 109 Fed. 456;

In re: Williams (D. C., Ark.) 9 Am. B. R. 741, 120 Fed. 38;

Brumbey v. Jones (C. C. A., 5th Cir.) 15 Am. B. R. 578, 141 Fed. 318;

Houston v. Shear (Tex. Ct. of Civ. App.) 43 Am. B. R. 462, 210 S. W. 976;

Matter of Hollins (C. C. A., 2d Cir.) 36 Am. B. R. 168, 229 Fed. 349.

Section 104, Title 11, U. S. C., §64 (a) of the Federal Bankruptcy Act, dealing with the question of priorities, says in part:

> "The court shall order the trustees to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: PROVIDED, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, *and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.*" (Italics ours.)

We wish to call the Court's particular attention to the last phrase above cited, by the terms of which the only power conferred upon the Bankruptcy Court is to inquire as to the *amount* or *legality* of such tax. There is no question involved in the case at bar either as to the legality of the tax imposed or as to the amount thereof. The question relates solely to the power of the Bankruptcy Court to divest the lien of the State and County for its taxes, and if the Court inquired into the taxes other than as to their legality, or their amount, then it was exercising an authority in excess of the jurisdiction conferred upon it by the Bankruptcy Act.

This is clearly the intent of the Statute, inasmuch as it requires the Trustee to pay all taxes, legally due and owing by the Bankrupt, to the various taxing powers of the country. It is not a question of an erroneous judgment upon the part of the Bankruptcy Court, but it is a question which goes directly to the root of the Court's jurisdiction, and there is no question but that the Bankruptcy Court, in disturbing the lien of the State for its taxes, exercised a jurisdiction which was not conferred upon it by the Statutes creating the Court.

As a further aid in determining this question, it might perhaps be of value to inquire into the general nature and extent of the taxing power of the State. This right to levy and collect taxes has always been recognized as one of the supreme powers of the State, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, as long as it keeps within the rights of the citizens, and does not impair the constitutional protection given them. It is a power exercised and controlled by legislative authority only, and not by the judiciary:

Union Pac. R. R. v. Peniston, 18 Wall. 5, 21 L. Ed. 787;
Leigh v. Green, 193 U. S. 79, 48 L. Ed. 623;
Thompson v. Allen Co., 115 U. S. 550, 29 L. Ed. 472;
Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763;
Cleveland v. Edwards, 109 O. S. 598, at page 604;
Western Union Telegraph Co. v. Mayer, 28 O. S. 521.

In the last cited case, we find the following words at page 533:

> "The power of the state to collect taxes for public purposes, is an inherent and indispensable incident of sovereignty. Without it no civilized state could discharge its functions."

Acting under the authority delegated to it the Legislature of Ohio enacted what is now known as Sec. 5671 of the General Code of Ohio which reads as follows:

> "*The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes* on the day preceding the second Monday of April, annually, *and continue until such taxes, with any penalties accruing thereon, are paid.* All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate." (Italics ours)

The purport of the above Statute is that the taxes, together with the penalties accruing thereon, are a permanent lien against the real estate assessed, which lien is perpetual and can only be removed by payment in full or be discharged according to other provisions enacted by the Legislature.

In the case of the *Security Trust Company v. Root*, 72 O. S. 535, the question arose as to whether the purchaser at a tax sale had a title paramount to that of a purchaser of the same real estate acquired through the sale of the same property in a foreclosure proceedings pending at the time of the tax sale. The Court held that the title of the purchaser at the tax sale was paramount, and said in part in its opinion:

> "* * * The lien of the state for taxes could not be ousted by a sale in foreclosure, and the state's lien having been, by virtue of this statute, transferred to the purchaser at the sale, it was neither satisfied nor discharged by the decree in foreclosure and the sale thereunder. The taxes were a lien paramount to all other liens and claims when the foreclosure suit was commenced, and the taxes were then delinquent as shown by the treasurer's duplicate, and before decree

the auditor's duplicate gave constructive notice that the defendant had purchased and had acquired a tax certificate. * * *"

In the above case the opinion of the Court of Appeals is found in 4 O. C. C. (N. S.), 129, and the Court in a well reasoned opinion commented upon the lien of the State for taxes as follows:

> "The lien of taxes on land, in favor of the state, and the right of the state to proceed to the collection thereof, in the mode provided by law, are paramount to the ownership or interests of private parties, and are not affected by the circumstance that a suit may be pending to foreclose and extinguish the title of the owner. It is not necessary or proper to make officers, upon whom the duty devolves to collect these revenues, or the state, or political bodies to which these revenues go, parties defendant to the action. The government and its officers are not to be hindered, delayed or obstructed in proceeding according to law to collect taxes for the support of the government, by the litigation of private persons with respect to rights and interests subordinate to the claims of the state."

The State of Ohio having the sovereign power of taxation, and giving to its Legislature the right to enact such laws as are within the constitutional limitations, and the Legislature having provided that the lien of the State for taxes against real estate may be removed only through payment, or through the provisions of the act for the sale of delinquent land taxes, the question then arises as to whether or not the sale of this property, free and clear of encumbrances, by the Trustee in Bankruptcy, would have the effect of removing the lien of the State for taxes legally assessed against the premises in question.

In the case of *Osterberg v. Trust Co.*, 93 U. S. 429, 23 L. Ed. 964, the Court held, in its opinion, as follows:

"* * * A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, * * *"

To this same effect is the case *In re Veitch,* 101 Fed. 251, where it was held:

"Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of the state), is sold to the mortgagee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured."

The Supreme Court of Ohio, in the case of *Monroe v. Doe,* 7 O. 262, held that the Statute of Limitations did not apply to any proceedings brought for the sale of property for delinquent taxes, and in its opinion the Court said in part, at page 265, as follows:

"* * * True, the land taxed is not forfeited to the state until it has been offered for sale. But still, the state has a lien upon all land not exempt from taxation, which is calculated to be perpetual, and which can not be affected by any sale or transfer. 29 Ohio Stat. 278. Neither will any length of possession affect this lien. *It can be removed in no other way than by the payment of all taxes, penalties, and interest due upon the land.* * * *"

Perhaps most nearly in point of any of the cases which we have been able to find upon this subject is the case of *Stokes v. State of Georgia,* 42 Ga. 412, 12 A. R. 588. In that case the purchaser of certain real estate bought at a

bankrupt sale, under order of the bankruptcy court, free and clear of all encumbrances, attempted to defend the sale of his property by the State for taxes on the ground that the same had been purchased from the Trustee in Bankruptcy free and clear of encumbrances. The opinion of the Court, which is short, is here quoted in full:

> "1. It has been said by a judge of a United States Court that 'the power of taxation is a sovereign political power, and a branch of the power of eminent domain.' Brightley's Fed. D. 158. Georgia expressly retains this power over all property in the State, and follows the property for the payment of her taxes, in whosoever hands found. The tax payer cannot dispose of his property so as to divest her of this right. Code, 809, 810, 811. The bankrupt law does not attempt to deprive a State of this power. True, it makes provision for the payment of the State taxes, if the State chooses to come into the bankrupt court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot divest the right of the State to enforce the payment of her taxes on the property, wherever it may be found.
>
> 2. If it is true that the property is bound for the taxes, it makes very little difference who the owner of that property is, or how a tax execution describes it, so it is done with sufficient definiteness to enable the levying officer to ascertain the property."

The above case has been cited with approval and followed in the case of *Mesker v. Koch*, 76 Ind. 68.

The general authority granted to Congress by Art. 1, Sect. 8, paragraph 4, of the Constitution is limited by the definition of the term "bankruptcies." (p. 24 Brief.) In England at the time this phrase was used in the Constitution, the laws on bankruptcy were held not to affect the rights of the Sovereign State to collect its revenues.

United States vs. Herron, 20 Wall. 251, 22 L. Ed. 275, 87 U. S. 251.

At page 278 Mr. Justice Clifford says:

> "Nor does the bankruptcy act impair or supersede the laws for the collection of taxes,"

and he further observes:

> "Greater unanimity of decision in the Courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts federal or state * * * of this country."

Woodyard vs. Sayre (W. Va.), 110 S. E. 689; 24 A. L. R. 1497, 2 syllabus:

> "At common law the state had the prerogative right independently of statute to preference and priority of payment over all general creditors for all debts, taxes or other demands in the distribution of the estate of an insolvent debtor."

Marshall vs. New York, 254 U. S. 380, 65 L. Ed. 315.

The sovereign states therefore never surrendered to the United States the power to authorize a bankruptcy court to interfere with their revenues, nor have the bankruptcy courts attempted to assume such power.

2. The Court of Appeals of Trumbull County, Ohio, gave full faith and credit to the judgment and decree of the District Court of the United States.

It will clearly appear from the opinion of the Court of Appeals of Trumbull County (R. 13) that full faith and credit was given to the judgment and decree of the District Court of the United States. Full faith and credit does not mean that the Court of Appeals was bound to follow the decision of the District Court when that decision was clearly in excess of the jurisdiction conferred upon it by the Bankruptcy Act, and amounted to an interference with the sovereign right of the State of Ohio to collect its taxes in the manner provided by its laws.

The respect accorded the rights of the State by the Federal Courts is clearly set forth in the comments of Mr. Justice Brandeis in *Marshall vs. New York*, 254 U. S. 380, 65 L. Ed. 315 at page 318:

> "While by the common law of England and by that of New York the priority (of taxes) does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of the State of New York extended the prerogative right so as to give certain taxes priority over prior encumbrances. An extension of this nature is found in No. 197 of the Tax law which declares in respect to the annual franchise tax that 'such tax shall be a lien upon and bind all the real and personal property of the corporation * * * from the time when it is payable until the same is paid in full.' By reason of that provision the annual franchise taxes take take priority over encumbrances on the corporate property (reference) * * *. Whether the priority enjoyed by the State of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such the decisions of the highest state court as to the existence of the right and its incidents wll be accepted by this Court as conclusive."

In our instant case the highest court of the State of Ohio, under a law similar to that of the State of New York has held that the taxes levied for the benefit of the State are a lien prior to other encumbrances (*Security Trust Co. v. Root*, 72 O. S. 535). It would seem that the doctrine of the *Marshall* case should apply, i.e., the United States should follow the interpretation of the State of Ohio with respect to the priority of its tax claims.

3. Conclusion.

From the cases and statutes above quoted, it is clear that the jurisdiction of the Bankruptcy Court is a limited jurisdiction, and that that court has no other or further jurisdiction than is specifically given it by the statutes

creating it or necessarily implied therefrom. These statutes specifically limit the jurisdiction of the Bankruptcy Court to an inquiry as to the amount and legality of the taxes imposed, and consequently give the Bankruptcy Court no right to divest the lien of the State for its taxes nor to disturb the priority of that lien.

The right of the State of Ohio to follow all real estate within its jurisdiction for the payment of taxes, is a sovereign right, which it never intended to delegate to the Federal Government and with which the Federal Government never intended to interfere and is a right with which no court can interfere unless the legislature has specifically given it jurisdiction. The fact that the decision here was rendered by the Federal Bankruptcy Court makes no difference, for neither that court nor any other court has jurisdiction to disturb the priority of the State for its taxes, nor to divest the real estate of the lien of such taxes; and any decree affecting such tax lien, either of a Federal Court or of a State Court, which exceeds the jurisdiction in the matter of taxes specifically granted by the Legislature of Ohio, is absolutely void, and is a nullity with no force and effect and may be impeached either directly or collaterally.

We are, therefore, of the opinion that the finding of the Court of Appeals of Ohio was correct and that the writ of certiorari herein prayed for should be refused.

Respectfully submitted,

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CHARLES ELMORE CR
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In the Supreme Court of the United States

OCTOBER TERM 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI, TO THE
SUPREME COURT OF OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF RESPONDENT.

G. H. BIRRELL,
Prosecuting Attorney,
Trumbull County, Ohio;

GEO. W. SECREST,
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GILBERT BETTMAN,
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Attorneys for Respondent.

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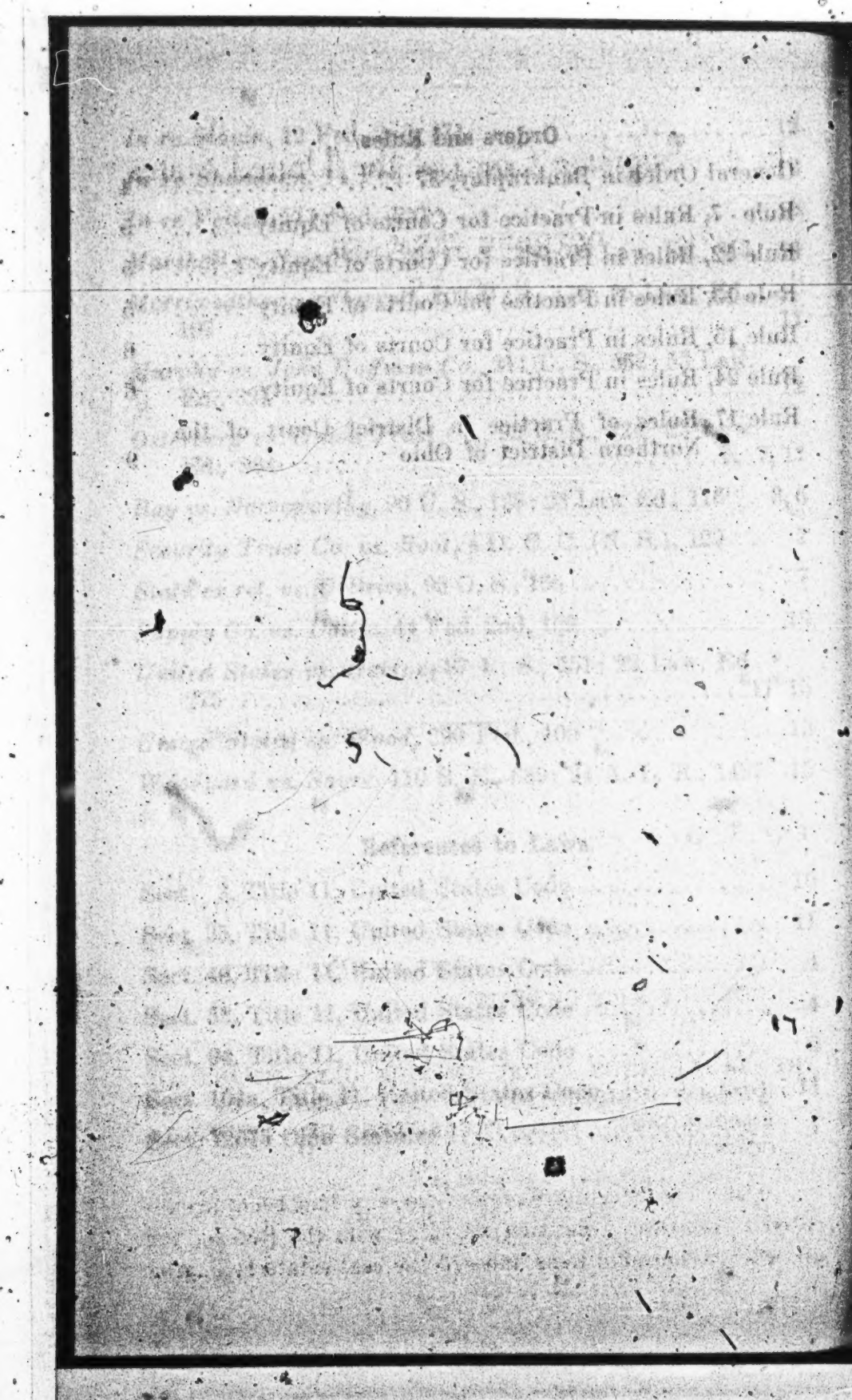

In the Supreme Court of the United States

OCTOBER TERM 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO,
WRIT GRANTED MAY 25, 1931.

SUPPLEMENTAL BRIEF OF RESPONDENT.

ARGUMENT.

THE BANKRUPTCY COURT HAD NO AUTHORITY TO REMOVE THE LIEN OF THE STATE OF OHIO FOR TAXES AND THE DECISIONS OF THE SUPREME COURT OF THE STATE OF OHIO, AND OF THE COURT OF APPEALS OF TRUMBULL COUNTY ARE CORRECT.

I.

THE BANKRUPTCY COURT IN THIS CASE NEVER ACQUIRED JURISDICTION OF THE PERSON OF THE RESPONDENT, THE TREASURER OF TRUMBULL COUNTY.

After The Sterling-Knight Company had been adjudicated a bankrupt, a petition was filed with the Referee for an order to marshal liens and sell the real estate belonging

to the bankrupt, in which petition certain mortgage holders and others were named as parties defendant. (Paragraph 3, Finding of Fact, page 20 of Transcript of Record.)

Upon the filing of such petition, the Referee *mailed* notice to the Treasurer of Trumbull County. (Paragraph 4, page 20.)

After receiving, *by mail*, notice of the filing of this application, the Treasurer of Trumbull County *mailed, to the Referee, a statement of the taxes due upon the real estate.* (Paragraph 4, page 22.)

Neither the Treasurer, nor his counsel, the Prosecuting Attorney, was present at any of the proceedings; nor did they have any knowledge of the finding of the court, determining the priority of liens. (Paragraph 5, page 23.)

The *notice of public sale* mailed to the Treasurer, after the order of sale was made by the Referee, *did not state* that the property was to be sold "free and clear of encumbrances." (Paragraph 6, pages 23 and 24.)

From these facts it is clear that the laws governing such proceedings in the bankruptcy court were not complied with.

Notices may be mailed only under the circumstances provided in Sect. 58, Title 11 U. S. C. of the bankruptcy act, which reads as follows:

> Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, of (1) the first meeting of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where

they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c All notices shall be given by the referee, unless otherwise ordered by the judge."

The only clause under which a notice referring to sales of property is authorized is in paragraph "a(4)", which provides that creditors shall have notice by mail of "all proposed sales of property." As mentioned above, the notice of the sale of property was given in this case, but did not contain any notification that the property was to be sold "free and clear of encumbrances." (Paragraph 6, pages 23 and 24.) There is no provision in this section for the *mailing* of notice respecting the filing of a petition to marshal liens upon real estate, and there is no provision in the bankruptcy act that provides that a notice may be *mailed for* such purposes.

A proceedings to determine the priority of liens is a "plenary" proceedings to which all claimants are entitled to be regularly summoned. The matter of summons has been determined in the case of *Ray v. Norseworthy*, 90 U. S., 128; 23 Law. Ed., 116; in which the court states, in speaking of the attempt to cancel and displace a mortgage without notice:

"Creditors in such a proceeding must have due opportunity to defend their interests as must be properly notified and summoned to appear for that purpose, or their rights will be unaffected by the proceedings."

This case was later approved in the case of *Factors' and Traders' Insurance Company vs. Murphy*, 111 U. S., 738; 28 Law. Ed., 582, in which the court says:

> "A sale of a bankrupt's property by order of the court, discharged from all liens, does not discharge the lien of one who has a mortgage on the property, but who was not a party to the bankruptcy proceedings."

In re Henderson, 206 Fed., 139, also holds that:

> Mere citation is not sufficient to bar mortgagee.

A general note with reference to cases discussing the difference between "plenary" and "summary" jurisdiction of the bankruptcy court is found in Title 11 United States Code Annotated Section 46, pp. 311-321,—but the above cited cases determine this question.

The requisites of a proper summons are determined by the rules of practice in Courts of Equity, referred to in the general orders in bankruptcy adopted by the Supreme Court of the United States, in conformity with the power conferred by Section 53, Title 11 U. S. C., of the Bankruptcy Act, to-wit:

> "All necessary rules, forms and orders as to procedure, and for carrying this act into force and effect, shall be prescribed and may be amended from time to time by the Supreme Court of the United States."

General order 37 reads as follows:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, *the rules of equity practice established by the Supreme Court of the United States shall be followed* as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be conformed to as nearly as may be. But the [illegible] may by special order in any case, vary the time [illegible] for appearance and

pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

The rules of practice with respect to notices or summons, for courts of equity of the United States read as follows:

RULE VII.—PROCESS, MESNE AND FINAL.—*The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill;* and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

RULE XII.—ISSUE OF SUBPŒNA—TIME FOR ANSWER.—Whenever a bill is filed, and not before, *the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff,* which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso.* Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately by each defendant, or a joint subpœna against all the defendants.

RULE XIII.—MANNER OF SERVING SUBPŒNA.—*The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of*

abode of each defendant, with some adult person who is a member of or resident in the family.

RULE XV. PROCESS, by whom served.—The service of all process, mesne and final, *shall be by the marshal of the district*, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

RULE XXIV.—SIGNATURE OF COUNSEL.—Every bill or other pleading *shall be signed individually by one or more solicitors of record*, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

It will be noticed that no subpoena was served upon the Treasurer of Trumbull County, as required by Rule VII, nor in the manner provided by Rules XII, XIII and XV; nor was any pleading subscribed by counsel filed in answer thereto as required by Rule XXIV. Therefore, proper steps were never taken to bring the Treasurer of Trumbull County into court, and no appearance was ever made by the Treasurer in the Bankruptcy Court. Since the Treasurer was not properly notified, and was not a party to this proceedings, the rule set forth in *Ray v. Norseworthy* and *Factors' and Traders' Insurance Company v. Murphy, supra*, applies, and the lien of the State for taxes cannot be affected.

Incidentally, the Treasurer of Trumbull County is a mere ministerial officer of the State of Ohio, and the County is merely a political subdivision of the State for administrative purposes;

Cincinnati vs. Jones, 24 O. C. C. (N. S.) 374 (Motion to certify overruled);

Hunter vs. Commissioners, 10 O. S., 515, p. 520;
State ex rel. vs. O'Brien, 95 O. S., 166.

The State of Ohio cannot be sued except in cases specifically authorized by Statute. There is only one method authorized for attacking taxes in Ohio, to-wit:

> §12075. JURISDICTION OF COURTS OF COMMON PLEAS AND SUPERIOR.—Common Pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

This is not a case which comes within the provisions of that section; and, in a foreclosure suit, the County Treasurer is neither a necessary nor a proper party to the action:

Security Trust Co. vs. Root, 4 O. C. C. (N. S.) 129, approved 72 O. S. 535.

II.

PETITIONER IS NOT AN INNOCENT HOLDER FOR VALUE.

I. J. Van Huffel purchased this property "free and clear of all encumbrances, except taxes for the year 1928," and received a Warranty Deed therefor. At [redacted] time the taxes remained unpaid on the tax duplicate of Trumbull County, a public record of which he was bound to take notice:

Osterberg vs. Union Trust Co., 93 U. S. 424; 23 Law. Ed., 964;
In re Harvey, 10 A. B. R., 567; 173 Fed. 745.

He chose to rely upon the warranty of his grantor in the face of the record of unpaid taxes of Trumbull County.

There were no unencumbered funds in the hands of the Bankruptcy Trustee, from which the taxes might have been paid. The real estate was sold to the first mortgagee, for the sum of $75,000.00—much less than its total claim of $231,000.00. Naturally, the first mortgagee was benefited, and should in equity have paid the taxes. In fact, according to the practice adopted by the Federal Courts, where real estate is of less value than the encumbrances, the Bankruptcy Court should have abandoned this property to the mortgagees, placing on them the burden of paying the taxes and adjusting the rights of other encumbrancers without making an additional expense for the bankrupt estate:

In re Veitch, 101 Fed., 251;
In re Brinker, 128 Fed., 634.

The sale of the mortgaged personal property amounted to $96,527.30, and this amount was paid to the first and second mortgagees on the personal property. Naturally, it would have been inequitable for the court to have taken property or money belonging to these mortgagees for payment of taxes to benefit the mortgagees on the real estate. In fact there was only $2544.46 of unencumbered funds in this estate, and it was necessary to secure contribution from the mortgagees in order to pay the cost of administration, totaling $19,171.46.

In fact, the Court of Appeals, in its original opinion, found that the first mortgagee was allowed to use, and apply the bonds secured by the first mortgage, as a set-off toward the payment of the purchase price, so that no money changed hands in this deal (p. 14 of Record.)

All of these amounts were settled and paid out long before the Treasurer of Trumbull County learned anything of the attempt to avoid payment of the taxes due the State of Ohio. (Paragraph 12, pages 25 and 26, Trans.

script of Record.) When he did learn of the order of the Bankruptcy Trustee, he was too late to take any action in that court because of the provisions of Rule XVII of the District Court of the Northern District of Ohio, to-wit:

> "Every petition for the review of an order made by referee shall be filed with the Referee within ten days from the entry of said order, but the Referee may, on written notion, and upon good cause shown, allow a longer time, not exceeding five days."

Under all these circumstances, and considering that this is a proceeding in equity, in which the Court will look through the form of the proceedings, and consider the basic principle of law applicable thereto, it is clear that the Treasurer of Trumbull County was never in a position to protect himself in this case, except by enforcing and maintaining the lien of the State for taxes, as he has done, against the real estate; whereas, on the other hand, the petitioner purchased the property knowing that taxes existed against the same, and chose to rely upon the warranty of his grantor, which, by this proceeding, expects to enrich itself in the amount of the taxes it should have paid to the State of Ohio.

III.

THE BANKRUPTCY COURT IS WITHOUT JURISDICTION TO SET ASIDE THE LIEN OF THE STATE FOR TAXES.

The general argument of respondent on this subject is set forth in the "Brief of Respondent Opposing the Petition for a Writ of Certiorari" in this case; and, (as we understand the practice in this Court), this Brief need not be repeated or re-written at this time. This general argument is supplemented by the written opinion of the Court of Appeals of Trumbull County, which is copied at pages 13 to 18 of the Transcript of the Record, and

which was approved by the Supreme Court of Ohio. This general argument is further amplified as follows:

A. The petitioner, in his "Brief in Support of the Petition for Writ of Certiorari," admits that the particular question here involved, (to-wit: *Whether an order can be made as against the lien of the State for taxes*), has not been passed upon or decided; and his argument in support of his position is:

> "It would seem, * * *, that inasmuch as a bankruptcy court must of necessity be authorized to sell property free of all encumbrances * * * there is no reason * * * why that doctrine should alone apply to lien claimants other than the Government, State or County." (Page 28)

The answer to this proposition is indicated by his further statement:

> "There is nothing to be found in the Bankruptcy Act which expressly authorizes the court to sell the property of the bankrupt free and clear of all liens or of any specific lien, or which requires the court to sell the property of the bankrupt subject to all liens, or to any specific lien." (Page 25)

The equity jurisdiction is conferred by Sect. 2, Title 11, U. S. C., of Bankruptcy Act, wherein the courts are invested with such jurisdiction at law or *in equity* as will enable them to:

(7) "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as hereinotherwise provided."

(15) "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as *may be necessary for the enforcement of the provisions of this title.*"

The equity powers of the Bankruptcy Courts to *make orders, issue process* and *enter judgments* are only such *as may be necessary* for the enforcement *of the provisions of* the act.

The Bankruptcy Court is a court of limited jurisdiction, (see cases cited pages 6 and 7, Brief of Respondent Opposing Petition for Writ of Certiorari), and if it is a court of limited jurisdiction, i.e., limited by the act of Congress, its authority ought not be extended by judicial construction. In other words, it ought not to be allowed to do under guise of a full fledged court of equity, that which it is unable to do because of lack of authority or jurisdiction granted by Congress. It cannot make itself a court of general equity jurisdiction, when the act creating it limits its powers to those necessary for the enforcement only *of the provisions* of the act itself.

As previously stated, the Bankruptcy Act in all its provisions assumes to protect the taxes due the sovereign states. In fact these taxes are not affected by the bankruptcy proceedings, because not affected by a discharge in bankruptcy, (§35). The Act further provides that the Trustee shall *pay taxes*, and provides that the court can determine only the amount or the legality thereof when that matter is drawn in question. (§104a)

Taxes are not ordinary debts, and have never been treated as such in the Bankruptcy Court:

U. S. vs. Herron, 87 U. S., 251; 22 Law. Ed., 275;

Osterberg vs. Union Trust Co., 93 U. S., 424, 23 Law. Ed., 964;

Merriweather vs. Garrett, 102 U. S., 472; 26 Law. Ed., 197;

In re Brosin, 297 Fed., 300, 3 Syl.

Since the "provisions" of the act give the court authority only to *protect* the State's right to its taxes, under what method of reasonin, can it be claimed that "equity" powers are necessary t *destroy* them? There being no power in the Act to discharge the bankrupt, or his property from tax claims, there is no *provision of this title* for *the enforcement* of which such equity jurisdiction *may be necessary.*

We think the proposition is elementary, that jurisdiction must be expressly granted. In the absence of an express grant of such power in the Act, jurisdiction to interfere with the lien of the State for taxes is withheld.

B. Petitioner's Brief is made up of *dicta* from many cases. Some of these refer to the general jurisdiction of the bankruptcy court, and have neither considered nor made mention of the specific application of the bankruptcy law to the question of taxes. Those cases which make reference to taxes, generally fall into the following classifications, which account for the assumption of authority by the Court in these matters:

(1) Where the "amount or legality" of taxes have been questioned:

In re General Film Corporation, 274 Fed. 903;
In re Anderson, 279 Fed., 525;
In re Stavin, 12 Fed. 2nd, 471;
In re Sheinman, 14 Fed. 2nd, 323;
In re Florence Commercial Co., 19 Fed. 2nd, 468.

(2) Where the property was already "*in custodia legis*", and some other court sought to interfere;

Ex Parte Tyler, 149 U. S., 164, 37 Law. Ed. 689;
Murphy vs. John Hoffman Co., 211 U. S., 562; 53 Law. Ed., 327;

Dayton vs. Standard, 241 U. S. 588, 60 Law. Ed., 1190 (Taxes were paid);

Supply Co. vs. Dattle, 44 Fed. 2nd, 159.

(3) Where no lien for taxes is claimed, or is provided by State law:

In re Prince & Walter, 131 Fed., 546, (The state law did not take effect until after the mortgage lien was acquired);

In re Anderson (*supra*);

United States vs. Wood, 290 Fed., 109, (Distinguishes between taxes and other debts due U. S.);

City of Chelsea vs. Dolan, 24 Fed. 2nd, 522;

In re Alamac Operating Corporation, 42 Fed. 2nd, 120.

(4) In many cases the bankruptcy court has assumed to sell the property "free and clear" of encumbrances, and has paid the taxes from the fund created from the sale. Of course, as long as the taxes are paid the State is satisfied, and no question has ever arisen, except between the court and the purchaser as to the application of proceeds held by the court:

In re Kellar, 6 A. B. R., 351; 109 Fed., 131;

In re Reading Hat Mfg. Co., 224 Fed., 786;

Dayton vs. Standard, 241 U. S., 588 (Taxes paid).

While there are statements in some of the above mentioned cases which, when taken alone, appear to question the impregnability of the State's lien for taxes, yet in every case there has existed a fund from which taxes were eventually paid and nowhere has the State been forced to defend its tax lien.

C. On the contrary there are numerous cases which have recognized the power of the State to create tax liens and appear to recognize the inability of the Bankruptcy Court to interfere therewith.

In *Marshall vs. New York*, 254 U. S., 380; 65 Law. Ed., 315, the right of the State to create a tax lien paramount to all other liens is recognized, and the rule adopted, that "the decisions of the highest court of the state as to the existence of the right and its incidents will be accepted by this court as conclusive."

Ex parte Tyler, 149 U. S., 164; 37 Law. Ed., 689, at p. 697:

"The Courts of the United States have always recognized the importance of leaving the powers of the State in respect to taxation unimpaired. Where the question involved arises under the State Constitution and laws, the decisions of its highest tribunal are accepted as controlling."

(Ohio law and cases are set forth in Respondent's Brief Opposing Writ of Certiorari, pp. 9-11.)

In re Kaler, 6 A. B. R., 251; 109 Fed. 181:

Sale by bankruptcy court "free and clear from all liens" does not affect the statutory lien for taxes.

In re Brinker, 128 Fed., 634:

Sale for less than mortgage,—taxes need not be paid for "the municipalities to whom the taxes are due being secured in any case by their lien on the property."

Dalzell vs. Columbia Co., 236 Fed., 31:

[illegible] to the res, without regard [illegible] ownership. Mortgagee purchasing at sale "free and clear," could not defeat state's lien.

Britton vs. Iowa Co., 9 Fed., 2nd, 488;

Recognizes that a lien created by state law and not provable under Sect. 63 is not affected nor destroyed by bankruptcy proceedings.

From these cases, and from the trend of the opinions in others, it seems that the courts have always recognized the sovereign character of the tax liens of the State:

United States vs. Herron, supra;

Woodyard vs. Sayre, 110 S. E., 689; 24 A. L. R., 1497.

D. As a conclusion, no doubt the Bankruptcy Court in the administration of the funds coming into its control may demand statements of taxes and if the proper tax officers fail to send in such statements, may pay out funds without regard to taxes; the court may determine the amount and validity of any tax claim; the Court may pay taxes from funds in its possession, and thus convey to purchasers at its sales property free and clear of incumbrances;

But any order removing or affecting the lien of the State for taxes is ineffectual unless the taxes are actually *paid*.

Wherefore, Respondent respectfully submits;

(1) That the Bankruptcy Court never acquired jurisdiction of the person of the Treasurer of Trumbull County, so as to make any order binding either upon him or upon the State of Ohio, which he represented;

(2) That under the circumstances of this case the petitioner is not an innocent purchaser, and is not equitably entitled to relief; and

(3) That the Bankruptcy Court had no jurisdiction to interfere with the lien of the State of Ohio for taxes.

And for these reasons the decisions of the Court of Appeals and the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

APPLICATION FOR RE-HEARING.

1. Now comes the respondent in this case, and applies to the Court for a re-hearing, and respectfully suggests to the Court that the decision heretofore rendered, on December 7, 1931, is erroneous, for the reason that this Honorable Court has failed to recognize the sovereign rights of the State of Ohio.

2. In making this application for re-hearing we feel that possibly it was made to appear to your Honors that the authority of the Federal Bankruptcy Court was the sole object of consideration in this case; and possibly, being a Federal Court itself, the Supreme Court failed to consider the effect that such an extension of the powers of the Bankruptcy Court has upon the rights and powers of one of the sovereign states. This decision affects not only Ohio but each state which provides a lien upon real estate for its taxes. In argument of this case, we had considered that our main function was to present the facts to the

gage holder could secure a lien upon the property of the mortgagor, there would be no validity or value to a mortgage. In fact, The Union Trust Company in this case relied upon the laws of the sovereign state of Ohio for the binding effect of its mortgage. Were it not for the existence of the sovereign State of Ohio, and were it not for the authority which the state possesses and exercises through its various officers, and especially through the maintenance of the county sub-divisions, and the various officers in these sub-divisions,—were it not for these things, the claims of The Union Trust Company, founded upon its mortgage, would have been valueless.

State Ought Not Be Required to Compete on Common Ground with Creditor.

8. Now, the State of Ohio must maintain its authority, and it can only do so because it receives revenue for that purpose. The petitioner, therefore, in attacking the right of the State of Ohio to secure its revenues, is attempting, by the aid of this Court, to destroy the very power on which he himself must rely for the protection of his rights. In other words, when, at the request of the petitioner in this case, this Court places the claim of a citizen of the state on a par with the claim of the sovereign state itself, it is both neglecting the sovereign character of the state's claim, and, by causing the state to compete with its subjects, it is depriving the state of the opportunity of protecting these same subjects.

United States Should Uphold State of Ohio.

9. When we apply to this Court, in the name of the State of Ohio, we do so with the firm belief that it is the duty of the federal courts, and of the federal government, to uphold the sovereign nature of the state's claims. The

state must exist for the protection of its subjects, unless the federal government expects to take over and regulate every branch of human affairs.

Bankruptcy Act Recognized Tax Claims.

10. In this case may we again call the Court's attention to the fact that, by the terms of the Bankruptcy law, the sovereign claims of the state to taxes have been expressly excluded from the operation of the bankruptcy statute. In other words, the United States Government, by its Congress, in the enactment of the bankruptcy law, expressly enacted that this law should not affect taxes[4]; and expressly protected the revenues of state governments by ordering them to be paid[5]; and by allowing only an inquiry with respect to the amount or the legality of any tax before ordering its payment.

Sovereign Never Consented that Tax Liens Be Questioned.

11. It is a familiar principle of law that the sovereign cannot be sued, unless it has provided a method, and specifically authorized such a suit. The State of Ohio has provided only one method of attacking the claim of the state for taxes, and that is by injunction on the ground of illegality.[6] No method is anywhere provided for attacking the priority of the tax liens, which is a separate matter from either the amount or legality of the tax. The State of Ohio has never admitted any doubt or right to dispute its priority in claims for its revenues, where those revenues are valid; nor has the State authorized any method by which tax liens can be transferred to any fund, or removed, from the property, other than by payment. Since the

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[4] Section 35, Title 11, United States Code.
[5] Section 104(a), Title 11, United States Code.
[6] Sections 12075 *et seq.*, Ohio General Code.

sovereign state has never granted its courts power to deprive it of its lien, is it not entitled to the protection of the federal courts, in the same manner that it is entitled to protection in the state courts?

State Protected Collection of Taxes.

12. Now, the Supreme Court bases its decision on the right of the bankruptcy court to sell property free and clear of all liens. If such power is an equitable power, then it exists in the State of Ohio, the same as it exists in courts of other states; but the State of Ohio protects its taxes by requiring them to be paid from the proceeds of the sale of the property.[7] The State of Ohio likewise provides that the lien of the state for taxes shall continue until paid.[8] Ohio has never given, nor have its courts assumed authority to interfere with the tax lien.[9] In fact, Ohio courts under equity practice have determined that the treasurer need not concern himself with equitable suits wherein the foreclosure of mortgages, and the marshalling of liens are concerned.[9] It never has been the practice in Ohio for the Treasurer to come into foreclosure suits to protect the lien of his taxes.

Equity Procedure Never Interfered with Tax Liens.

13. The Courts of Ohio, and of every other state, have exercised equity jurisdiction in the marshalling of liens since their creation. Every state which authorizes tax liens protects these liens at a judicial sale of property, by requiring taxes to be first paid from the proceeds of that sale. In practice, each such judicial sale is "free and clear of encumbrances," as far as mortgages and other such claims are concerned. But never have state courts assumed

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[7] Section 5692, Ohio General Code.
[8] Section 5671, Ohio General Code.
[9] *Security Trust Co. vs. Root*, 72 O. S. 535.

that their equitable powers extended to the setting aside of their sovereign's rights. Now, will the decision in this case enlarge the general scope of equitable jurisdiction? Is it necessary or desirable to interfere with settled practice?

No Federal Precedent.

14. In federal procedure, of course, there is no precedent in this line, except, perhaps, the cases mentioned in bankruptcy practice. The United States Government has no direct taxes levied upon real estate. In fact, the Federal Courts, as far as we are informed, do not exercise jurisdiction in the foreclosure of mortgages, because this jurisdiction has been left to the states, through whose authority mortgage liens have been authorized.

Bankruptcy Practice Not Binding as Law.

15. It is true that the bankruptcy courts in some instances have assumed the power to sell land free and clear of all encumbrances, including taxes. This, however, does not necessarily prove that such is the law. In fact, in all the reported cases the courts have almost invariably required that the taxes be paid in some manner. As long as the taxes were paid, the various states interested had no quarrel with the dicta of the judge rendering the opinion. Only in an instance of this kind, where this matter is actually brought to the attention of the federal courts, may it be said that a decision of the Court will become authority for such a proposition of law.

Disregards Ohio's Rights.

16. Now, the federal government comes into the State of Ohio, and disregards entirely the provisions which the State of Ohio has authorized for the security of its revenues in foreclosure cases, and allows real estate in the State of

Ohio to be sold free from the lien of these revenues. The Bankruptcy Act itself does not authorize such a procedure. The laws of the State of Ohio do not authorize such a procedure. The principle of the Federal Practice Act, that courts shall follow the laws of the state in which they exist, does not authorize such procedure. Upon what principle then must a decision of this kind be based?

Priority a Non-Controversial Matter.

17. The sole object of consideration in this case is a non-controversial matter; *i.e., The lien upon real estate for taxes takes priority over every other claim.* Never has this matter been disputed in Ohio, never in any other state, so far as our research can find, and never by the Federal Courts. We are not speaking now of any illegality, of course, because we may assume the tax legal until its legality is questioned. In this case petitioner admits that the state's lien should be prior to the mortgage. Since, therefore, there is no disputed question of law on the subject of priority of the tax liens, why is it necessary to extend the court's jurisdiction? Why is it necessary to make a controversial, out of a non-controversial, matter? What good is accomplished by requiring the Treasurer to always be watching the Bankruptcy Court, to see that he secures proper protection? Why can he not, as in the past, rest secure on settled practice that the sovereign's revenues will be protected? If there were a controversial question on each claim, then he should be required to protect his interests; but when his time and expense would be required solely to see that the Federal Court does not make a clerical error, as it were, on an undisputed question, it seems unnecessary to place such an additional burden upon him. In other words, since a non-controversial question is involved, since tax liens on real estate are admittedly prior to other liens, we believe that no good is accomplished by making a

controversy of it; and we further believe such was the whole intent of the Bankruptcy Act in permitting the Court authority to determine only questions of amount or legality of taxes, and otherwise requiring payment.

Question of Advisability.

18. Is it necessary to place the state government at a disadvantage solely for the sake of extending the power of the federal courts?

Unnecessary Hardship on State.

19. Speaking from the standpoint of the state government, we cannot see that the benefit gained to the federal court is a drop in the bucket, compared to the detriment to the power of the state government. Why should the bankruptcy court be authorized to render an "erroneous" decision, which will take the revenues away from the State? If this power is authorized to the bankruptcy courts, will it not be frequently used? May we not suppose that, in the multitude of cases there will be other decisions as clearly "erroneous," and as clearly prepared for the benefit of some private creditor who wants to collect his claim in preference to the taxes due his sovereign? Must we place the burden upon the treasurer of the county, to expend the time and the state's money in traveling back and forth from his county seat to the bankruptcy court, for the sole purpose of preventing an error of the referee? It were better if the referee were informed by the decision in this case that such errors would not be recognized. As a public officer, the treasurer ought to be able to rely upon the validity of the lien of the state for taxes, and it ought not be made necessary that he travel hither and yon to protect these liens. There is already too great an expense in the maintenance of our governments. As long as he is acting according to law, and as long as the validity or legality of

his taxes have not been attacked in any manner, either provided by the law of the State of Ohio or provided in the bankruptcy law as enacted by Congress, why is there any reason now for placing an additional burden upon him? Since the law of the State of Ohio provides that the lien of taxes shall be a lien which shall remain on the property until paid,[10] is it necessary now to declare that law controversial or invalid, solely to extend the authority of the bankruptcy court?

Purchasers Required to Know Law.

20. The purchaser of property from the bankruptcy court is as clearly acquainted with the law as is the county treasurer. The purchaser knows that the State of Ohio provides a lien upon the property for its taxes. The purchaser knows that if those taxes are not paid the lien is not removed. The purchaser is in position to bid or not to bid, and to determine the amount of his bid according to his own desires. If the property is not worth the taxes, he need not bid; and the court may, as in past instances, abandon the property. As a matter of law, the purchaser can protect himself with much less expenditure of time and money than can the county treasurer, if the treasurer be required to keep a supervisory eye always on the referee in bankruptcy.

Summary of Principles.

21. The summary of the principles in this case is this: The county treasurer ought not be required to watch the referee to see that no mistake is made by the bankruptcy court. The referee ought not (and we believe was never intended to) have the power to make a mistake affecting so seriously the State's lien for its revenues. The State, from

[10] Section 5671, Ohio General Code.

its sovereign character, ought to (and we believe does) have the undisputed power to levy and secure its recompense from the property within its borders, over which it has the supreme authority. To maintain these rights in the State will not affect the rights of a purchaser at a bankruptcy sale, nor will it increase or diminish the value of the property. The private creditor ought not benefit himself to the detriment of the State. And, to magnify and dignify the mistake of a referee to a power to deprive the State of its rights, is unnecessary and unprecedented either in law or in practice.

Conclusion.

22. Now, if the Court please, we may have failed to present the sovereign claims of the State of Ohio in as forceful and as clear a manner as their character deserves. We may have failed to impress this Court with the importance of the decision in this case to the state governments. If the laws laid down by the legislature of the State of Ohio, or as enacted by the Congress of the United States provided for a situation wherein the state must meet its subjects on a common and non-controversial ground, and defend its right to existence against the claims presented by its subjects, where there exists no dispute whatever of its rights, we would assume there is no remedy in this case. But, when the decision must be based solely on the extension of the authority of the federal court to sell property "free and clear of encumbrances," and, when that extension of authority invests the officers of the federal court with the right to cancel admittedly valid revenues of the sovereign state of Ohio, we believe that this Supreme Court ought to reconsider its decision. There is good reason why the lien of the state for taxes is different in character from the lien of the private debts of

its subjects. There is good reason why even the bankrupt's property should pay its taxes before paying its debts to private creditors. And, the fundamental basis of our position consists in the belief that the sovereign state must be protected, and that its right to collect revenues for its perpetuation is a right, separate and superior, to the rights of its subjects to collect their private debts.

Request for Rehearing.

23. Since, therefore, the State of Ohio has provided that the only method of attacking taxes is by the bringing of an action to enjoin their collection, on the ground of their illegality; since the State of Ohio has provided no method whatever for attacking its lien upon the real estate within its borders for the security of its taxes; since the treasurer of a political sub-division of a state has a right to rely upon the federal courts within that state, following the laws of the State of Ohio; since the Bankruptcy Act of Congress provides for the protection of taxes of the state, and provides no method whereby the lien of the state for taxes may be removed from the property; since there is a difference, and a fundamental and important difference between taxes and ordinary debts, as decided numerous times by this Supreme Court; and since there is no necessity for the extension of the powers of the Bankruptcy Court in its equity jurisdiction to sell property free of the lien of the state for taxes; we again respectfully submit to this Court that the previously announced decision is wrong —that this Court has not considered the importance and revolutionary character of this new federal power to the sovereign State of Ohio,—and that, therefore, a re-hearing ought to be granted in this case, and further consideration given these matters, before such a radical change in the

division of powers between the State and Federal Governments is finally adopted.

Respectfully submitted,

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GEO. W. SECREST,
Assistant Prosecuting Attorney,
Trumbull County, Ohio,

GILBERT M. BETTMAN,
Attorney General,
State of Ohio,
Attorneys for Respondent.

Certificate of Good Faith.

I, G. H. BIRRELL, Prosecuting Attorney of Trumbull County and counsel for respondent, hereby certify that this application for re-hearing is presented in good faith and not for delay, but because I believe a rehearing ought to be had upon the decision in this case.

Signed: G. H. BIRRELL.

SUPREME COURT OF THE UNITED STATES.

Nos. 54 and 55.—October, 1931.

I. J. Van Huffel, Petitioner,
vs.
Trace D. Harkelrode, Treasurer, etc.

On Certiorari to the Court of Appeals of Trumbull County, Ohio.

On Certiorari to the Supreme Court of Ohio.

[December 7, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

Van Huffel brought this suit in the Court of Common Pleas of Trumbull County, Ohio, to quiet his title to two parcels of real estate acquired from the purchaser at a sale made by the bankruptcy court for that district. The defendant, the county treasurer, asserts a lien for unpaid state taxes which had accrued prior to the bankruptcy. The sale was made pursuant to an order of the bankruptcy court which directed that all liens be marshalled; that the property be sold free of all encumbrances; and that the rights of all lien holders be transferred to the proceeds of the sale. The trial court entered a decree quieting the title. Its judgment was reversed by the Court of Appeals of the county. The Supreme Court of the State declined to review the case. 177 N. E. 587. This Court granted certiorari. 283 U. S. 817.

Section 5671 of the Ohio General Code provides: "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid." The bankruptcy court, having held two mortgages executed by the bankrupt to be prior in lien to the taxes, applied all of the proceeds of the sale toward the satisfaction of one of them; and left the state taxes unpaid. The treasurer did not by any proceeding in that court question the propriety of such action. Van Huffel

admits that the decision of the bankruptcy court was erroneous in denying priority to the taxes, but insists that it is *res judicata*. The treasurer contends that the judgment of the bankruptcy court authorizing and confirming the sale free from the tax lien is a nullity, because the court was without power to sell property of the bankrupt free from the existing lien for taxes; and also because it did not acquire jurisdiction over the State in that proceeding.

First. The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867,[1] contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure.[2] *First National Bank* v. *Shedd*, 121 U. S. 74, 87; *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352, 367. The lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by § 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.[3]

No good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine "the amount or

[1] Act of March 2, 1867, 14 Stat. 517, c. 176, §§ 1, 20; Ray v. Norseworthy, 23 Wall. 128, 134. See as to Act of August 19, 1841, 5 Stat. 440, c. 9, Houston v. City Bank of New Orleans, 6 How. 486, 504.

[2] Compare City of New Orleans v. Peake, 52 Fed. 74, 76; Mercantile Trust Co. v. Tennessee Cent. R. Co., 294 Fed. 483, 485-6; Murray Rubber Co. v. Wood, 14 F. (2d) 528; Broadway Trust Co. v. Dill, 17 F. (2d) 486; Seaboard Nat. Bank v. Rogers Milk Products Co., 21 F. (2d) 414, 416.

[3] See, *e. g.*, In re Pittelkow, 92 Fed. 901, 902; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 527, rev'd on other grounds, 99 Fed. 707; In re Union Trust Co., 122 Fed. 937, 940; In re Keet, 128 Fed. 651; In re Harralson, 179 Fed. 490, 492; In re E. A. Kinsey Co., 184 Fed. 694, 696; In re Roger Brown & Co., 196 Fed. 758, 761; In re Hasie, 206 Fed. 789, 792; In re Codori, 207 Fed. 784; In re Franklin Brewing Co., 249 Fed. 333, 335; Gantt v. Jones, 272 Fed. 117, 118; In re Theiberg, 280 Fed. 408, 409; In re Gimbel, 294 Fed. 883, 885; In re King, 46 F. (2d) 112, 113.

legality" of any tax. To transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration. Compare *International Shoe Co.* v. *Pinkus*, 278 U. S. 261; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Straton* v. *New*, 283 U. S. 318. In many of the cases in the lower federal courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others;[4] and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order.[5] No case has been found in which the power to sell free from the lien of state taxes was denied.

Second. The treasurer contends that the order authorizing a sale free from encumbrances was void as against the State for lack of notice and opportunity to be heard. He asserts that he had no knowledge of the ruling of the court determining the priority of the liens; that neither he nor his counsel, the prosecuting attorney, was present at any of the proceedings; and that the notice of the public sale, mailed to him after the order of sale had been made by the referee, did not state that the property was to be sold "free and clear of encumbrances." But it appears that prior to any action by the court, notice of the filing of the application to sell free and clear of encumbrances was mailed to the treasurer; and that thereafter he mailed to the referee a statement of the taxes due. It is urged that such notice was insufficient; and also that a proceeding to determine the priority of

[4]Compare In re New York & Philadelphia Package Co., 225 Fed. 219, 222; In re Gerry, 112 Fed. 958, 959.

[5]In re National Grain Corp., 9 F. (2d) 802, 803; Delahunt v. Oklahoma County, 226 Fed. 31, 32; In re New York & Philadelphia Package Co., 225 Fed. 219, 222; In re Reading Hat Mfg. Co., 224 Fed. 786, 789, 790; In re Torchia, 185 Fed. 576, 578, 584; In re Kohl-Hepp Brick Co., 176 Fed. 340, 342; In re Prince & Walter, 131 Fed. 546, 549; Matter of Hilberg, 6 A. B. R. 714, 717. Compare Dayton v. Stanard, 241 U. S. 588, 589, aff'g 220 Fed. 441; In re Florence Commercial Co., 12 F. (2d) 468, 469; In re Stamps, 300 Fed. 162, 163; In re Tri-State Theatres Corp., 296 Fed. 246; C. B. Norton Jewelry Co. v. Hinds, 245 Fed. 341, 343; In re Haywood Wagon Co., 219 Fed. 655, 657; In re Crowell, 199 Fed. 659, 661; In re Vulcan Foundry & Machine Co., 180 Fed. 671, 675; In re Keller, 109 Fed. 131, 134. See also Little v. Wells, 29 F. (2d) 1003; Heyman v. United States, 285 Fed. 685, 688.

liens is plenary, whereas the order now complained of was entered in a summary proceeding. Compare *Ray* v. *Norseworthy*, 23 Wall. 128. We have no occasion to pursue the argument. So far as appears, neither of these objections was made by the treasurer below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here. Compare *Peck* v. *Heurich*, 167 U. S. 624, 628, 629; *Virginian Ry. Co.* v. *Mullens*, 271 U. S. 220, 227, 228; *New York* v. *Kleinert*, 268 U. S. 646, 650.

Third. There remains for consideration a question of practice. After the adverse judgment in the Court of Appeals, Van Huffel filed in the Supreme Court of Ohio a petition in error as of right, claiming that a constitutional question was involved; and he filed there also a motion requesting that the Court of Appeals be directed to certify its record for review. The Supreme Court dismissed the petition in error on the ground that no debatable constitutional question was involved; and it overruled the motion to certify the record for review. An application for rehearing was denied, as to both. Van Huffel filed two petitions for certiorari, one (No. 54) directed to the Court of Appeals, the other (No. 55) directed to the Supreme Court. He states that he did this because he was uncertain to which of the state courts the certiorari from this Court should be directed.

The question which we have discussed is a federal constitutional question. The Constitution of Ohio, Article IV, § 2, confers upon the Supreme Court of the State "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state." The order of the Supreme Court dismissing the petition in error as of right, on the ground that no debatable constitutional question was involved, was not, in law, a dismissal of the petition for want of jurisdiction. It was a decision of the case on the merits. *Hetrick* v. *Village of Lindsey*, 265 U. S. 384, 386; *Matthews* v. *Huwe*, 269 U. S. 262, 265. Under the federal practice a writ of certiorari would, therefore, have to be directed to that court if it had possession of the record to be reviewed. *Atherton* v. *Fowler*, 91 U. S. 143, 146. The petition in error as of right was necessarily accompanied by a transcript of the final record in the Court of Appeals. Ohio General Code, § 12,263. It is suggested in the brief for the treasurer, however, that such record went out of the possession of the Supreme Court after it dismissed

the petition in error and denied the motion for certiorari; and in support of this allegation we are referred to Rule IX of the Supreme Court, 122 O. S. lxxii, which provides for the return of the record to the lower court "after the decision of a cause . . . in which a final record is not required to be made in" the Supreme Court. But we have obtained the record from the court whose decision we are to review, and so have no occasion to resort to any other court in order to get it. *Atherton* v. *Fowler, supra*. Our Rule 43 provides that the certified transcript of the record on file here shall be treated as though sent up in response to a formal writ. The case at bar should, therefore, properly be considered on the writ (in No. 55) issued to the Supreme Court of Ohio; and the writ (in No. 54) issued to the Court of Appeals should be discharged.

In No. 55, Judgment reversed.
In No. 54, Writ of Certiorari discharged.

A true copy.

Test:

Clerk, Supreme Court, U. S.